Supreme Court, U. S.
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THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-902

RICHARD H. OLSEN,

Petitioner

v.

SAUL GOODMAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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FLORIDA FINANCIAL PRINTING, INC. — 758-1782

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CITATIONS

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered on July 30, 1976, and an order denying a petition for rehearing entered on October 15, 1976.

OPINIONS BELOW

The Final Judgment of the Circuit Court of Dade County, Florida, dated March 17, 1972, was not reported, but is printed at Appendix A hereto.

The Order of the District Court of Appeal, Third District, dated November 17, 1972, dismissing the Appeal, is reported in 269 So.2d 782, and is printed at Appendix B hereto.

The Opinion of the Supreme Court of Florida, dated May 9, 1973, reversing the District Court of Appeal and reinstating the Appeal is reported in 278 So.2d 612, and is printed at Appendix C hereto.

The Opinion of the District Court of Appeal, Third District, dated March 12, 1974, affirming the final judgment of the Circuit Court of Dade County, *per curiam*, is reported in 291 So.2d 71 and is printed at Appendix D hereto.

The Opinion of the Supreme Court of Florida, dated November 7, 1974, reversing the District Court of Appeal, is reported in 305 So.2d 753, and is printed at Appendix E hereto.

The Order of the Supreme Court of Florida, dated January 29, 1975, denying a rehearing, is not reported, but is printed at Appendix F hereto.

The Order of the Supreme Court of Florida, dated July 30, 1976, denying the Petition for Constitutional Writ in Aid of Jurisdiction and the Petition in Favor of Review, is not reported, but is printed at Appendix G hereto.

The Order of the Supreme Court of Florida, dated October 15, 1976, denying a rehearing, is not reported, but is printed at Appendix H hereto.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on July 30, 1976. A petition for rehearing was denied on October 15, 1976.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 2101(c).

THE QUESTIONS PRESENTED

1. Did the deliberate misstatements of fact and law by former Florida Supreme Court Justice David L. McCain, to the members of the Court, while he presided as the lead Justice in Case #43,168 and Case #45,356, deny the Petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by denying him a fair and impartial hearing?

2. Did the actions of the Supreme Court of Florida in summarily denying, without argument or opinion, Petitioner's Petition for Constitutional Writ in Aid of Jurisdiction to review the actions of former Justice David L. McCain in Cases #43,168 and #45,356, where said Petition properly demonstrated twelve substantive errors of fact and law contained in the misleading, confidential written memoranda circulated by McCain, as lead Justice, to the other Justices of the Court, conflict with the Fourteenth Amendment to the Constitution of the United States by denying Petitioner a fair and impartial hearing on appeal, thereby depriving him of due process of law?

STATEMENT

I. NATURE OF THE CASE:

This Petition grows out of a Petition for Constitutional Writ in Aid of Jurisdiction to the Supreme Court of Florida on an appeal to that Court from the District Court of Appeal, Third District, reversing that Courts *per curiam* affirmance of the jury verdict in favor of the Petitioner rendered in the Circuit Court of Dade County, Florida.

II. PERSONS INVOLVED:

THE PETITIONER: Richard H. Olsen is a member of the Florida Bar having been admitted in 1957, and an investor

THE RESPONDENT: Saul Goodman is a retired banker of forty years experience having been the Vice Chairman of the Board and Executive Vice-President of the Gary Trust and Savings Bank of Gary, Indiana.

III. THIS CASE:

This cause involves an action at law on a contract. The contract provided for a loan to Olsen (the Defendant below and the Petitioner herein) and for the purchase of stock for Olsen and for Goodman (the Plaintiff below and the Respondent herein).

The written contract was prepared, signed and executed in the State of New York. The trial of the action was in the State of Florida and the parties agreed that the laws of the State of New York controlled and they were applied at the trial.

The principal defense interposed by Olsen to the lawsuit was that the contract was usurious under the applicable laws of the State of New York, and, therefore, unenforceable. The case, after two days of trial before a jury with the application of the laws of New York, resulted in a verdict for Olsen followed by a judgment thereon.

Goodman entered an appeal to the Third District Court of Appeal in Florida but failed to file a brief within the time prescribed by the Florida Rules of Appellate Procedure. Olsen filed his brief and two weeks later filed a motion to dismiss the appeal. At a hearing on the motion to dismiss, the motion was granted and the appeal dismissed.

Goodman then petitioned the Supreme Court of Florida for a writ of certiorari which writ was subsequently granted. A panel of the Supreme Court reinstated the appeal and remanded the cause to the District Court of Appeal to be heard on its merits. Upon hearing, the District Court of Appeal issued a *per curiam* affirmance of the jury verdict in favor of Olsen.

Subsequently, Goodman again sought a writ of certiorari from the Supreme Court on a claim of conflict of jurisdiction pursuant to Article 5, Section 3(b) (3) of the Constitution of the State of Florida. The conflict claimed was between the *per curiam* holding of the District Court of Appeal and the opinion in the *State of Florida, ex rel., the Florida Bar v. Delves*, 160 So.2d 114, and the *Florida Bar v. Pitts*, 219 So.2d 427, which cases are concerned entirely with an interpretation of the integration rules of the Florida Bar and not with the usury law of the State of New York.

A panel of the Supreme Court, with a dissenting opinion, granted certiorari and subsequently reversed the District Court of Appeal. The Judgment of reversal remanded the cause to the Circuit Court of Dade County for re-trial with directions prohibiting the interposition of the defense of usury.

A petition for rehearing was filed by Olsen. The Petition, in part, set forth that the Supreme Court lacked jurisdiction to grant the writ of certiorari where no conflict existed with respect to the laws of New York. The Petition was denied on the 29th of January, 1975.

Subsequently, Olsen filed a petition for writ of certiorari to this Court, Case No. 74-1610, citing violations of Articles One and Four, and the Seventh and Fourteenth Amendments to the Constitution of the United States on grounds different from those presented herein. This Petition was denied on October 6, 1975.

During the proceedings of the second Goodman-Olsen appeal, Case No. 45,356, the Select Committee on Impeachment of the Florida House of Representatives was holding public hearings on the conduct of three Florida Supreme Court Justices, all of whom had participated on the panels adjudicating the two Goodman-Olsen appeals. As a result of these hearings, Justices Dekel and McCain resigned from Court and the Goodman-Olsen Florida Supreme Court Files #43,168 and #45,356 became a matter of open public record, including the heretofore confidential memoranda of the Court.

Testimony and exhibits of record indicated irregularities in the Goodman-Olsen appeals. The confidential files of the Court revealed that the first Goodman appeal, Case No. 43,168, was assigned to Justice Ervin as the lead Justice. A jurisdictional memorandum in the file recommended a denial of jurisdiction. A vote had been taken on jurisdiction and the vote was four to one to deny. Both the jurisdictional memorandum and the record of the four to one vote to deny jurisdiction were crossed through and without explanation the case was re-assigned to former Justice McCain who wrote a second jurisdictional memorandum recommending granting the writ without oral argument, which was done. Nothing in the record reflects any reason why this case was re-assigned to Justice McCain from Justice Ervin nor why an order denying jurisdiction was not issued after the four to one vote in favor of same.

Cases in the Florida Supreme Court are normally assigned to Justices on a blind random selection basis. The second Goodman appeal, however, Case No. 45,356, again had Justice McCain assigned as the lead Justice. The confidential memoranda in this case written by Justice McCain presented gross and flagrant misrepresentations of the record to the other Justices of the Court and omitted facts necessary to a proper determination of the issues involved. The recitation of facts in the confidential memoranda of Justice McCain were not the facts found by the trial jury below.

On the 29th of June, 1976, Olsen filed a Petition for Constitutional Writ In Aid of Jurisdiction with the Supreme Court of the State of Florida. The Petition urged that an examination and analysis of the confiden-

tial memoranda contained in Cases #43,168 and #45,356 disclosed a manipulation of the facts of record and the applicable law in a fashion calculated to mislead the members of the Court. The Petition set forth and documented only twelve of the irregularities, misstatements and ommissions contained in the confidential memoranda of the cases in contrast to the actual record of pleadings, documents and transcripts of the trial court.

On July 14, 1976 a Petition in Favor of Review was filed by Donald L. Tucker, as Speaker of the Florida House of Representatives and by William J. Rish, as Chairman of the Florida House of Representatives' Select Committee on Impeachment Inquiry. The Petition, in part, states that the Petitioners have reviewed the formerly confidential files of the Florida Supreme Court and concur in the allegations of the Olsen Petition for Constitutional Writ that misrepresentations and misstatements of fact and law have been practiced upon the Court. Further, the Petition states that the practices and methods of former Justice McCain, as alleged in the Olsen Petition, are those which the Select Committee on Impeachment discovered in its impeachment investigation of former Justice McCain; that it is in the public interest when questions of this type are raised before the Court, that the Court review the matter to determine whether the facts found by the jury and comprising the record below have been ignored or distorted by a Justice in reaching a decision; whether fraud or other imposition has been perpetrated upon the Court, or any other party, and whether the ruling of the Court was based upon a misrepresentation or misstatement of the record.

On July 30, 1976, the Supreme Court of Florida denied the Olsen Petition for Constitutional Writ In Aid of Jurisdiction and the Petition in Favor of Review filed by the Speaker of the Florida House of Representatives and the Chairman of the Florida House of Representatives' Select Committee on Impeachment. A petition for rehearing on this matter was timely filed and was denied on October 15, 1976.

REASONS FOR GRANTING WRIT

The fundamental proposition presented is whether the Supreme Court of Florida has afforded due process of law when it summarily brushed aside, without a hearing, responsible charges that a former Justice who resigned rather than face impeachment charges, defrauded the Court by misleading it as to the facts and the law while he presided as the lead Justice in the instant cases. This Court has said: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . ." In re; *Murchison*, 349 U.S. 133, 136 (1955).

It is submitted that Petitioner has been denied due process of law at two stages in these proceedings. The first denial of due process occurred when former Supreme Court of Florida Justice David L. McCain, in at least twelve instances, while presiding as the lead Justice, misled the other members of the Court by misstating both the facts and the law in three confidential briefing memoranda circulated to members of the Court. The first memoranda asserted that the Supreme

Court of Florida had jurisdiction to hear the appeal and the other two memoranda went to the merits of the appeal. Twelve specific instances of misrepresentation of the trial court record by former Justice McCain are detailed in Appendix I, pages A 14 to A 73.

Due process in these proceedings means nothing less than having the case determined solely on the basis of the trial record, the facts found by the jury and the application of the law of the State of New York, which law the parties had stipulated as governing the trial. When the Supreme Court of Florida, in rendering its opinion based not upon these considerations, but upon the perniciously distorted confidential memoranda prepared by former Justice McCain, the Court effectively denied Petitioner the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The second denial of due process of law occurred when the Supreme Court of Florida summarily dismissed, without argument or opinion, the Petitioner's Petition for Constitutional Writ in Aid of Jurisdiction. In the face of the very serious charges of fraud on the part of a former justice, reluctantly raised by Petitioner, the Supreme Court of Florida denied Petitioner due process of law when it failed to hear argument, and when it failed to set aside its former decision in this case and to re-schedule the proceedings for a *de novo* hearing. The failure of the Court to so act leaves undissipated the cloud over it, resulting from the resignation of former Justice McCain and another justice in the face of impeachment as well as from the actions of the former Justice in the instant proceedings.

The Speaker of the Florida House of Representatives and the Chairman of its Select Committee on Impeachment filed a Petition in Favor of Review of the Olsen Petition for Constitutional Writ in Aid of Jurisdiction, stressing the public interest involved and requesting the Supreme Court of Florida to take jurisdiction and to grant them leave to intervene for the purpose of filing an *amicus* brief. Appendix J, pages A 74 to A 75. In their petition, they stated that the pattern of misrepresentation spelled out in the Olsen Petition for Constitutional Writ followed the practices and methods of former Justice McCain that were uncovered in the impeachment investigation by the Select Committee. It was this investigation that brought about the resignation of the former Justice from the Supreme Court of Florida. In other words, former Justice McCain deliberately abused the practice of confidential internal briefings for the purpose of directing other members of the Supreme Court of Florida to the erroneous conclusions he desired them to reach both as to assumption of jurisdiction by the Court and as to the merits of the cases, conclusions which were not predicated on the facts of record. Had the confidential memoranda not been made a matter of public record during the impeachment investigation, former Justice McCain's fraud would never have come to light.

The Supreme Court of Florida stated in *State ex rel., Davis v. Parks*, 194 So.613, at 615 (1939):

> *"This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge.* It is the duty of the Courts to scrupulously guard this right and to refrain from attempting to

> exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. *The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.*" (Emphasis supplied.)

This Court has underscored the foregoing fundamental tenet of justice by stating:

> "But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " In re *Murchison*, supra, citing *Offut v. United States*, 348 U.S. 11 (1954).

Petitioner wishes to make abundantly clear that he in no way suggests that any imputation of taint attaches to the Supreme Court of Florida, as presently constituted. The Petitioner can understand fully the present Court's hope that the impeachment scandal of the recent past will not serve to blot out the Court's previous record of excellence nor diminish respect for it in the future. However, the fraudulent misrepresentations of the record to the Court by former Justice McCain in his capacity as the lead Justice in these cases will not fade away, and should not be allowed to fade away, if the Court, through its refusal to take action, fails to face up to its responsibilities under the Constitutions of both the United States and the State of Florida. Public confidence in the Supreme Court of Florida can only be restored by its granting *de novo* hearings in these proceedings before the Court as now constituted. The results of such *de novo* hearings would then stand without cloud. Petitioner will abide by such decision secure in the knowledge that due process will then have been accorded him.

CONCLUSION

When the Supreme Court of Florida refuses even to be briefed or to hear argument on substantial representations bearing on the very integrity of its process, it seems fundamental that the Constitution intended, within the context of its Fifth and Fourteenth Amendments, that this Court would provide a forum of review. Absent that, where lies justice?

Ultimately what is sought here is the return of this proceeding to the Supreme Court of Florida with directions that it order briefs on the matters raised herein, entertain oral argument thereon, and then enter a decision which articulates findings of fact and conclusions of law. Petitioner is convinced that if the Supreme Court of Florida, as presently constituted, does so, it will be compelled to the conclusion that the ends of justice require that it set aside its prior decision in these proceedings and re-schedule them for argument *de novo*. Petitioner respectfully submits that due process of law requires nothing less than this. For these reasons, we respectfully urge that this Court grant certiorari.

Respectfully submitted,

/s/ Robert D. Peloquin, Esquire

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CASE NO. 70-2149 (Williams)

SAUL GOODMAN,	:	
Plaintiff.	:	*FINAL JUDGMENT*
vs.	:	*FOR DEFENDANT*
RICHARD H. OLSEN,	:	
Defendant.	:	

Pursuant to the verdict of the Jury rendered upon the trial of this action, it is

ORDERED and ADJUDGED that plaintiff, SAUL GOODMAN, take nothing by this action and that the defendant, RICHARD H. OLSEN, go hence without day and that he shall recover costs from the plaintiff, to be taxed at a later date by this Court.

DONE and ORDERED at Miami, Florida this 16th day of March, 1972.

Circuit Judge

APPENDIX B

Not final until time expires to file Rehearing Petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1972
FRIDAY, NOVEMBER 17, 1972

SAUL GOODMAN, **
Appellant, **
vs. ** CASE NO. 72-798
RICHARD H. OLSEN, **
Appellee. **

This cause having come on for hearing upon appellee's motion to dismiss appeal and appellant's motion to file appellant's brief, and the court having considered same, it is ordered that appellant's motion to file brief is denied, appellee's motion to dismiss is granted and this appeal from the Circuit Court of Dade County, Florida (#70-2149) be and the same is hereby dismissed.

A True Copy
ATTEST:

/s/ Clerk District Court of Appeal, Third District

cc: Prunty, Ross, DeLoach & Olsen
Ragano & LaPorte
Gene Williams
E. B. Leatherman
/h

APPENDIX C

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973

SAUL GOODMAN, :
Petitioner, :
v. : CASE NO. 43,168
RICHARD H. OLSEN, :
Respondent. :
:

Opinion filed May 9, 1973
Writ of Certiorari to the District Court of Appeal, Third District
Leo Greenfield; and Harold D. Lewis of Lewis & Lewis, for Petitioner
John W. Prunty of Prunty, Ross, DeLoach & Olsen, for Respondent

McCAIN, J.

This cause is before us on petition for writ of certiorari to review an order of the District Court of Appeal, Third District, reported at 269 So. 2d 762, which conflicts with Hector Supply Co. v. Carter, 122 So. 2d 22 (Fla. App. 3rd, 1960). We have jurisdiction pursuant to Fla. Const., Article V, Section 3(b)(3) (1973).[1]

On June 23, 1972, the appellant (petitioner here and plaintiff in the trial court) filed his notice of appeal in the District Court of Appeal, Third District, from an adverse judgment of the Circuit Court of Dade County. Difficulties in the prosecution of the appeal arose when, on September 23, 1972, appellee filed his brief on the merits with the District Court prior to the submission of appellant's brief. At the time

1. Under the new Article V, this Court may review by certiorari any decision of a district court of appeal "that is in direct conflict with a decision of *any* district court of appeal or of the supreme court on the same question of law. . ." Fla. Const. Article V, Section 3(b)(3) (1973).

of filing his brief, however, appellee made no motion to dismiss the appeal for failure of appellant to submit a brief.

On October 19, 1972, appellee moved to dismiss because of appellant's failure to comply with Rule 3.7a, F.A.R. Thereupon, on November 2, 1972, appellant filed a motion for leave to file his brief and explain his delay with supporting affidavits. Both motions were heard by the Court on November 13, 1972, at which time appellant filed his brief at the Court's suggestion.

On November 17, 1972, the District Court entered its order denying appellant's motion for leave to file his brief and granted appellee's motion to dismiss. Certiorari to this Court followed.

In the case cited for conflict, *Hector Supply Co. v. Carter, supra*, appellant filed a brief which failed to conform to the requirements of Rule 3.7(4), F.A.R. Subsequently, appellee filed his brief and in it also argued that the appeal should be dismissed because of appellant's failure to conform to the appellate rules. The District Court concluded that the motion to dismiss was untimely, observing:

> "... No motion was presented to this court to require the appellant to file a brief in conformity with the rules or suffer a dismissal of its appeal. The appellee chose to wait until the filing of his brief and therein argued that the appeal should be affirmed because of the violation of the rule. Such an objection is untimely."

A similar situation exists in the instant case. Sub judice, appellee filed his brief on September 23, 1972 but made no motion to dismiss until nearly a month later. In these circumstances, it is our judgment that the objection was untimely and that the District Court abused its discretion in dismissing the appeal.

Accordingly, certiorari is granted, the order of the District Court of Appeal, Third District, is quashed and the cause remanded to that Court with directions that the appeal be reinstated.

It is so ordered.

ERVIN, Acting Chief Justice, ADKINS and DEKLE, JJ., Concur

BOYD, J., Dissents

APPENDIX D

To file Rehearing Petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1974

PAUL GOODMAN, *Appellant,*
vs.
RICHARD H. OLSEN, *Appellee.*

CASE NO. 72-798

Opinion filed March 12, 1974.

An Appeal from the Circuit Court for Dade County, Gene Williams, Judge.

Leo Greenfield, for appellant.

Prunty, Ross, DeLoach & Olsen, for appellee.

Before BARKDULL, C.J. and CARROLL and HENDRY, JJ.

PER CURIAM

Affirmed. See: Busser v. Sabatasso, Fla.App.1962, 143 So.2d 532; Sharp v. Dixon, Fla.App.1971, 252 So.2d 805; DeKerwin v. First National Bank of Chicago, N.D. Ill.1959, *170 F.Supp. 112*; Knickerbocker Life Insurance Co. v. Nelson, 1897, *78 N.Y. 137*; Breunich v. Weselman, 100 N.Y. 609, *2 N.E. 385*; U. T. Hungerford Brass & Copper Co. v. Brigham, 47 Misc.Rep. 240, *95 N.Y.S. 867*; Empire Trust Co. v. Coleman, 85 Misc.Rep. 312, *147 N.Y.S. 740*; Bishop v. Rider, 235 A.D. 736, *255 N.Y.S. 787*; In Re Grottola's Estate, Sup.Ct.1953, *124 N.Y.S.2d 85*; Moore v. Plaza Commercial Corp., 9 A.D.2d 223, *192 N.Y.S.2d 770*; Equitable Life Assurance Society of the United States v. Kerpel, 38 Misc.Rep.2d 856, *238 N.Y.S.2d 1016*.

APPENDIX E

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

SAUL GOODMAN,	:	
Petitioner,	:	
v.	:	CASE NO. 45,356
RICHARD H. OLSEN,	:	DCA CASE NO.
Respondent.	:	72-798
	:	

Opinion files November 7, 1974

Writ of Certiorari to the District Court of Appeal, Third District

Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner

John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he

would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So. 2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry V. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S.2d 106, 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup.Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint venture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had

been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), *rev'g* 12 Misc. Rep. 434 (Dist.Ct. N.Y. City 1895). In the *Orvis* case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lose anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in *Orvis* held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the *Orvis* minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: *Cusick v. Ifshin*, *supra*.

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000 was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather

from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumption there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur
OVERTON, J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circuit Court and the Third District Court of Appeal.

APPENDIX F

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1975
WEDNESDAY, JANUARY 29, 1975

SAUL GOODMAN,		
Petitioner,	**	CASE NO. 45,356
vs.	**	THIRD DISTRICT
RICHARD H. OLSEN,	**	COURT OF APPEAL,
Respondent.	**	72-798

On consideration of the Petition for Rehearing filed by attorneys for respondent and reply thereto,

IT IS ORDERED that said petition is denied.

ADKINS, C.J., ROBERTS and McCAIN, JJ., and ERVIN, Ret. J., concur
OVERTON, J., dissents

A True Copy
TEST:
Sid J. White
Clerk Supreme Court

By: Kay O. Yent
Deputy Clerk

Y
CC: Hon. W. P. Carter, Clerk
Hon. Gene Williams, Judge
Hon. John W. Prunty
Law Offices of Leo Greenfield
Hon. Frank Ragano

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 30, 1976

SAUL GOODMAN,

Petitioner,

vs.

RICHARD H. OLSEN,

Respondent.

** CASE NOS. 43,168
** 45,356
**

The Petition in Favor of Review filed by Donald L. Tucker, as Speaker of the Florida House of Representatives, and William J. Rish, as Chairman of the Florida House of Representatives' Select Committee on Impeachment, etc., is denied, and it is further

ORDERED that the Petition for Constitutional Writ in Aid of Jurisdiction filed by Respondent Olsen is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y
CC: Hon. Wilbur E. Brewton
Hon. Leo Greenfield
Prunty, Ross, De Loach & Olsen
Hon. John W. Prunty
Hon. Talbot S. D'Alemberte,
Hon. Marc H. Glick
Peloquin, McKeon & Reilly
Hon. Frank Ragano

APPENDIX H

IN THE SUPREME COURT OF FLORIDA

FRIDAY, OCTOBER 15, 1976

SAUL GOODMAN,

Petitioner,

vs.

RICHARD H. OLSEN,

Respondent.

** CASE NOS. 43,168
45,356

All Justices having reviewed this matter, the Petition for Rehearing filed in this Court on August 16, 1976 is denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y
CC: Hon. Wilbur E. Brewton
Hon. Leo Greenfield
Prunty, Ross, De Loach & Olser
Hon. John W. Prunty
Hon. Talbot S. D'Alemberte,
Tallahassee, Miami
Hon. Marc H. Glick,
Tallahassee
Peloquin, McKeon & Reilly
Hon. Frank Ragano

APPENDIX I

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43, 168
45, 356

DCA NO. 72-978

SAUL GOODMAN,

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

PETITION FOR CONSTITUTIONAL WRIT IN AID OF JURISDICTION

Respondent, RICHARD H. OLSEN, files this Petition for Constitutional Writ in Aid of Jurisdiction, pursuant to Article V, Section 3(b)(4), Florida Constitution, seeking a review by this Court of the actions, memoranda, orders and opinions of former Justice David L. McCain in two petitions for writ of certiorari brought before this Court in Case Number 43,168 and Case Number 45,356. These cases involve the same parties and subject matter and have been consolidated into one petition rather than separate petitions.

INTRODUCTION

Extraordinary circumstances exist for the consideration of the granting of this Petition. Following the disposition of these cases by this Court, respondent has now had the opportunity to examine this Court's own internal documents in the captioned cases. These previously confidential documents were made a matter of public record in the hearings by the Select Committee on Impeachment of the Florida House of Representatives. As a result of these hearings, former Justice David L. McCain resigned from this Court in the face of specific Articles of Impeachment.

The matters set forth in this Petition are presented to this Court for the first time as they relate to this Court's internal documents prepared by former Justice

McCain. Where indicated, respondent OLSEN has cited the authority for the basis of this claim and he has supplied all the emphasis hereinafter set forth.

This petition is respectfully submitted after considerable thought and discussion, and is not in any manner intended to be disrespectful of this Court, but is intended to point out certain occurrences which Respondent believes may be relevant to the procedures in the conduct of this case.

Examination and analysis of the attached documents appear to disclose a manipulation of the facts of record and the applicable law in a fashion calculated to mislead the other members of this Court. It is submitted that the actions of former Justice McCain, as demonstrated hereinafter, could amount to a perpetration of fraud upon this Court and Respondent herein.

INHERENT POWER

Pursuant to Article V, Section 3(b)(4)of the Constituion of the State of Florida, it is clear that this Court has the inherent power to examine any matter in order to protect the integrity of its processes.

The prevailing view of this Court's power to reverse itself is set forth in the case of Lovett v. State, 11 So. 176. In this case, this Court reversed a decision of a lower court based upon a false representation of the record, and issued a remittitur which was filed in the latter court. After discovery of the misrepresentation, this Court reversed itself, correcting the error and said, at 180:

> "The consideration or reversal or affirmance of a judgment or decree, upon a misrepresentation of the record of the cause, or upon anything else than the true record of that cause, is entirely outside the functions or purpose of an appellate court."

In pursuing this matter further, this Court continued, saying:

> "This case is, in our judgment, clearly within the rule which preserves our jurisdiction of it. We have been misled into

> reversing a judgment on a false record; into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. In law, the writ of error issued in the cause is, in so far as our exercise of our powers is concerned, still before us, and will be until that cause, as it really is, shall be decided, or the writ dismissed on legal grounds. Ostensibly it has passed from use, but only through the means of a misrepresentation, and by decision of a case which is not shown by the real record and does not exist. In the eyes of the law, however, decisions or judgments obtained in this manner are not binding on us."

In reaching the above decision, this Court relied on the case of Rowland v. Kreyenhagen, 24 Cal. 52, wherein, after stating the general rule that a court loses jurisdiction after issuance of a remittitur, said:

> "...it is said that this general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party, and that, if it appears that such has been the case, the court will assert its jurisdiction, and recall the case; that against judgments improvidently granted upon a false suggestion, or under a mistake, as to the facts of the case, the court will afford relief after the adjournment of the terms, and, if necessary, recall the remittitur, and stay proceedings in the court below; that this is not done upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order; that, in contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity; if, under color of such an order, the proceedings have in part (fact) found their way back to the court below, yet in the law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the facts and law agree."

In the instant matter this Court has the unquestioned power and authority to examine what Respondent considers misrepresentations of fact and law; and any abuses of its own procedures and processes.

FACTS

The two Petitions for Writ of Certiorari, captioned above, stem from a suit filed in the Circuit Court of Dade County, Florida, Case Number 70-2149, and a subsequent appeal to the Court of Appeal, Third District, Case Number 72-798. Plaintiff in the trial court, was the appellant in the Third District, and petitioner in both Petitions for Writ of Certiorari shall hereinafter be referred to as Goodman. Defendant in the trial court was appellee in the Third District, and respondent in both Petitions for Writ of Certiorari, shall hereinafter be referred to as Olsen.

This cause involved an action at law on a contract dated September 17, 1968. Under the contract, the terms of which were dictated to Olsen by Goodman, a retired banker of 40 years experience, Olsen borrowed $150,000 from Goodman to purchase 25,000 shares of Omega Equities Corporation stock. Goodman further deposited with Olsen an additional $150,000 for Olsen to purchase for Goodman the same amount of stock for Goodman's personal account.

The contract between the parties required Olsen to repay the loan to Goodman on May 31, 1969, eight and one-half months later. As a consideration for the loan, Goodman, for a specified period of time, had the right to require Olsen to purchase his Omega stock. The sale of that stock to Olsen would give Goodman a profit of $100,000.

The trial record reveals that Goodman was aware that Olsen was acting as a trustee for other investors, in addition to himself and Goodman. These were investors who were also purchasing Omega stock and who had given their money to Olsen for their respective shares in the block of Omega stock available.

Investors other than Goodman and Olsen also purchased stock in the same venture during the same time frame. These investors were:

Name	No. Shares	Date
Amstock Industries, Inc.	15,000	7/24/68
Applegate, Leason & Co.	45,000	11/1/68
Ask Mr. Foster Travel Ser.	25,000	10/22/68
Buttonwood Associates	15,000	8/9/68
Buttonwood Internat'l	10,000	8/9/68
Couri Industries, Inc.	15,000	8/9/68
Essex Fund, Inc.	100,000	9/4/68
Frobisher Securities, Ltd.	25,000	9/5/68
Golden Gate Fund, Inc.	6,500	10/31/68
JBL Investment Co.	306,000	10/31/68
Mates Investment Fund	300,000	7/9/68
Ocean Technology Fund, Inc.	6,500	10/31/68
140 Associates	150,000	8/9/68
Pennsylvania Mutual Fund	100,000	7/24/68
Scottsbluff Mortgage Loan	25,000	10/11/68
757 Associates	105,000	8/29/68
Varley & Co.	75,000	8/9/68
Total	1,324,000 shares	

Testimony at the trial disclosed that Goodman delivered a check for $300,000, payable to Richard H. Olsen, Trustee. The check was endorsed in the presence of Goodman, by Olsen, as Trustee, "payable to Omega Equities Corporation, for deposit only," and the check was subsequently delivered to the Omega office in New York City, together with the funds of the other investors for the purchase of the block of Omega stock.

Testimony further disclosed that the day following the purchase of the block of Omega stock, but prior to the Goodman check clearing Goodman's bank, Goodman telephoned Olsen, who had returned to Miami, and told him he had stopped payment of the check because he had subsequently decided that he was not making enough money on the transaction. Goodman thereupon demanded a payment of $25,000 from Olsen before he would permit the check to clear.

The purchase agreement was for a block of 100,000 shares of Omega stock and called for payment of $600,000, of which $300,000 was represented by Goodman's check. Olsen, in an effort to protect the funds of the other investors, who had purchased stock valued at $300,000, negotiated the Goodman demand to $10,000 via Western Union. Upon receipt of the funds, Goodman permitted his check to clear collection at his bank.

The written agreement was prepared, signed, executed and performed in the State of New York and the parties had agreed that the laws of New York governed the transaction.

IT IS IMPORTANT TO POINT OUT THAT AT NO TIME DID AN ATTORNEY/CLIENT RELATIONSHIP ATTACH BETWEEN OLSEN AND GOODMAN.

After maturity of the note, Goodman demanded payment of $150,000 and received a payment of $50,000 on account. When Olsen failed to make a further payment, Goodman filed suit in the Circuit Court of Dade County, Florida, Case Number 70-2149. The first count of the complaint demanded judgment for $100,000, alleging that to be the balance of the money owed on the loan. The second count sought damages for Olsen's alleged failure to buy the Omega stock purchased by Goodman.

The principal defense interposed by Olsen to the suit was that the contract was usurious under the applicable laws of the State of New York and, therefore, unenforceable.

The case, after a two-day trial before a jury, with the application of the laws of the State of New York, resulted in a verdict for Olsen.

On June 23, 1972, Goodman entered an appeal to the Court of Appeal, Third District, Case Number 72-978. The Goodman brief, pursuant to the Florida Rules of Appellate Procedure, was due on September 2, but was not filed. On September 27, Olsen timely filed his brief and alleged, with other matters therein, that Goodman had abandoned his appeal.

On October 18, 22 days following the filing of the Olsen brief, Olsen filed a separate Motion to Dismiss or Affirm Judgment. A hearing on the motion was set by the court for November 13. On November 1, 59 days after his brief was due, Goodman filed a Motion for Leave to File Appellant's Brief. On November 13, 71 days late, Goodman, without permission of the Court, filed a brief with the Clerk and, on the same day, the Court of Appeal, Third District, entered an order denying the Goodman Motion for Leave to File Appellant's Brief and granting the Olsen Motion to Dismiss the Appeal.

Goodman then brought aaction by way of a Petition for Writ of Certiorari, Case Number 43,168, seeing a reversal of the Third District. This Court, by an Opinion written by former Justice McCain, took jurisdiction, without oral argument, granted certiorari and reinstated the appeal.

Upon mandate of this Court, the Third District considered the action on its merits, and subsequently affirmed, per curiam and without opinion, the jury verdict in favor of Olsen.

Goodman again sought relief from this Court by way of Petition for Writ of Certiorari, Case Number 45,356, and certiorari was granted. On November 7, 1974, in an Opinion again written by former Justice McCain, with a dissent written by Justice Overton, this Court reversed the Third District, remanding this cause to the trial court for a new trial, with directions barring the use of the defense of usury by Olsen.

The current posture of the litigation is that it is before the trial court. The trial court, since it is prohibited from considering the defense of usury by Olsen, has entered a partial summary judgment on Count I of the complaint and Count II is pending trial, scheduled for July, 1976.

The matters hereinafter set forth are obtained from the heretofore confidential records of the Florida Supreme Court as they relate to case Number 45,168 and Number 45,356.

EXTRAORDINARY CIRCUMSTANCES AND MISREPRESENTATIONS AS TO CASE NO. 43,168

To present this Court with a complete picture of the misrepresentations, omissions and fraud practiced herein, it is necessary to set forth matters which may initially appear insignficant, but are fragments of the overall picture, that, when taken in view of the totality of the circumstances hereinafter set forth with Case 45,356, should demonstrate respondent's claim.

ITEM 1. The confidential records of this Court disclose that this case was originally assigned to Justice Ervin, who acted as the lead Justice, Exhibit A. For reasons unexplained by the record, this case was subsequently re-assigned to former Justice McCain who then became the lead Justice. At the impeachment hearings on Justice McCain, conducted by the House Select Committee on Impeachment, Mr. Sid White, Clerk of this Court, testified that Justice McCain had requested certain cases be assigned to him and that reassignments of cases, such as above set forth, are irregular and an unusual procedure.

ITEM 2. As further disclosed by this Court's confidential records, a memorandum on determination of jurisdiction certiorari had been prepared recommending this Court deny jurisdiction, Exhibit B. During the period Justice Ervin presided as the lead Justice, a vote was taken on jurisdiction, Exhibit C. The vote was four to one to deny jurisdiction, with Justice McCain voting with the majority. For reasons nowhere explained, no Order or Opinion denying jurisdiction was issued pursuant to this vote. The memorandum on jurisdiction is crossed through, as is the record on the vote denying jurisdiction, Exhibits B and C, supra.

ITEM 3. This Court's confidential records contain a subsequent memorandum on "DETERMINATION OF JURISDICTION ON REASSIGNMENT FEBRUARY 5, 1973," written by former Justice

McCain, Exhibit D. This memorandum is both legally and factually misleading. Under "FACTS," the second paragraph, second from the last sentence, former Justice McCain asserts:

> "Petitioner filed his brief at the Court's [3rd DCA] suggestion on that date."

A similar statement is repeated twice in the memorandum. These statements are wholly unsupported by the record, as shown by the Order of the Third District, Exhibit E.

To the contrary, unbeknownst to either Olsen or the Court, Goodman, through his attorney, Frank Ragano, filed a brief with the Clerk, without permission of the Court, on the very date of the hearing on his Motion for Leave to File Appellant's Brief. At no time did the Third District ever suggest that Goodman file his brief. The numerous statements by the lead Justice in his memorandum to this Court that Goodman filed his brief at the suggestion of the Court could only imply acceptance by the Court of Appeal of Goodman's alleged "excuse" for not filing his brief and thus serve to prejudice this Court in favor of Goodman.

In addition to the foregoing, the memorandum cited in support of conflict jurisdiction, Hector Supply Co. v. Carter, 122 So.2d 22, involves a dissimilar factual situation. In the Hector case, the petitioner timely filed a brief; the respondent filed a reply brief and noted therein that petitioner's brief did not conform to the rules and should be dismissed. Respondent did not file a separate motion to dismiss but waited until oral argument on the briefs to argue for dismissal. In this case Goodman did not file a brief; Olsen filed a brief alleging, among other atters, that Goodman abandoned the appeal. Receiving no response, Olsen then filed a separate motion to dismiss, which motion was heard by the Third District and granted.

In the last paragraph of "FACTS," former Justice McCain sets forth his rationale of this case and the Hector case, and states:

> "In both cases, appellants did not file briefs (sub judice, appellant did later file a brief,. . .")

This is a fallacious and misleading statement to this Court. As set forth above, the petitioner in the Hector case timely filed his brief, although it was not in conformity with the rules. The assertion by the lead Justice that no brief was filed in the Hector case makes the factual situation with this case appear more similar to the prejudice of Olsen.

Continuing the examination of this memorandum, it is stated, under "RECOMMENDATION" the following:

> "Grant certiorari and waive oral argument. The record is simple.*"

The asterisk at the bottom of the page is followed by this statement:

> "Without attempting to go to the merits, the record proper indicates a fairly strong case for petitioner, i.e., (1) no showing of prejudice to respondent due to petitioner's tardiness in filing brief, (2) internal mixup between lawyers, and (3) brief was finally filed by petitioner."

These statements by former Justice McCain are unsupported by the record and only serve to further mislead this Court in its determination of conflict jurisdiction. First, the Rules of Appellate Procedure do not require a showing of prejudice to dismiss an appeal; second, there was only one attorney of record for Goodman so there was no "mixup" between lawyers; and third, Goodman's petition to file his brief was denied. These are the facts of record and directly refute the facts as represented by the memorandum submitted to this Court by former Justice McCain.

Both the Hector case and this case were decided by the Court of Appeal, Third District. In dismissing the original appeal, the Third District was presented with the factual basis of the Hector case, Exhibit F, and in comparing it with the facts of this case, rejected it as inapplicable.

The prejudicial misstatements of fact represented to this Court in the memorandum by the lead Justice have effectively misled this Court as to the factual circumstances.

EXTRAORDINARY CIRCUMSTANCES AND MISREPRESENTATIONS AS TO CASE NO. 45,356

The matters hereinabove set forth, though important in overall consideration in developing the pattern of distortion woven by former Justice McCain, are minor in comparison to the omissions of fact and misstatements of fact withheld from and presented to this Court in Case Number 45,356.

ITEM 4. The Progress Docket, Exhibit G, shows this case assigned to former Justice McCain. Given the standard procedure by the Clerk's office of "blind assignment" of cases on a rotation basis, it appears extraordinary that former Justice McCain again became the lead Justice. As stated hereinabove, in Case #43,168, for reasons unknown he became the lead Justice through a re-assignment, but there is nothing unique to this case that would warrant his re-assignment to it following the per curiam affirmance by the District Court of Appeal. In his position as lead Justice, former Justice McCain is again in a position to control the case and to guide the thinking of this Court through his representations and his written memoranda.

ITEM 5. Exhibit H is the memorandum on "DETERMINATION OF JURISDICTION CERTIORARI" written by former Justice McCain. This Court should closely scrutinize this memorandum as to its representations of the facts and law, in contrast with the actual facts and law as established in the records of the lower court. The memorandum contains gross and flagrant misrepresentations of the facts and it fails, through omission, to apprise this Court that this case was to be governed by, and tried under, the laws of the State of New York, as agreed to by the parties therein.

To provide this Court with an over all view of the practice utilized by former Justice McCain, it is again necessary to point out certain items, each seemingly minor by itself, which when taken together appear to demonstrate that former Justice McCain did not base his briefing memoranda on the record below.

The distortion of facts proffered hereinafter shall be set forth as "Misstatements" and shall be underlined in red on said exhibit H to aid this Court in purposes of identification. Where this memorandum of "Determination of Jurisdiction certiorari" omits a fact which was presented to and determined by the lower court, such "Omission" shall be duly presented to this Court for examination.

Misstatement (1). This is an actual "omission" or "non-statement" rather than a misstatement. In his recitation of "FACTS" in the memorandum, former Justice McCain concealed from this Court a major fact that controls, not only the determination of jurisdiction but the determination of the merits of this case as well; he failed to state that the case was governed by the laws of the state of New York. The applicability of the New York law was not at issue in the trial court or Third District; it was a matter upon which the parties had fully agreed, Exhibit I.

It is the manifest duty of the lead Justice to properly inform the members of this Court of the applicable law which governed the proceedings below. For reasons known only to himself, former Justice McCain suppressed this information, failed to perform his duty and then arbitrarily applied the laws of Florida to the proceedings in an attempt to justify his statement of "FACTS" to this Court.

Misstatement (2). Under "FACTS," first paragraph, former Justice McCain starts by editorializing. He makes a personal determination of fact rather than reporting the facts as they existed, when he says:

> "Goodman and Olsen entered into an investment contract relative to a business venture."

Although this statement appears innocent, it sets the tone for the remainder of the memorandum and the final Opinion. The only correct fact in the opening statement is that Goodman and Olsen entered into a contract; the matter of it being an investment, and the related business venture is the conclusion of Justice McCain.

Misstatement (3). In the same paragraph, former Justice McCain states:

> "Olsen prepared and wrote in his own hand a contract under the terms of which Goodman agreed. . ."

The obvious implication of this statement is to lead this Court to believe that it was Olsen who had developed the terms of the Agreement, when in fact the terms and conditions of the Agreement had been dictated to Olsen by Goodman, as evidenced by the testimony at trial, TT 102-106 and 224-25, Exhibit J. The factual issue as to who set the terms of the Agreement was determined by the jury to be Goodman and was affirmed by the Third District, but the jury finding is distorted and ignored by former Justice McCain in the memorandum.

Misstatement (4). Under "FACTS," paragraph five, except for the year, which should be 1968, this portion of the memorandum is correct, as far as it goes, saying:

> "On September 18, Goodman delivered to Olsen a check in the amount of the contract, i.e., $300,000."

But former Justice McCain again "omits" all of the facts. The memorandum fails to advise this Court of the next factual occurrence which took place, the demand by Goodman for a kickback of $25,000 from Olsen before he would permit his check to clear collection, TT 116-119, 250-51, Exhibit K. This demand was negotiated to the lesser amount of $10,000 and was paid to Goodman via Western Union money order, Exhibit L, to protect the interest of the other investors whom Olsen represented as a Trustee.

The payment of the $10,000 to Goodman was, in fact, a fee extorted from Olsen to prevent Goodman from stopping payment on his check. This act was separate from the Agreement and, by itself, a usurious act under the laws of New York as set forth in Breunich v. Weselman, 100 N.Y. 609, 2 N.W. 385, where the Court said:

> "A loan is usurious if made upon the condition that a portion of the sum loaned shall be retained by the lender when there is no consideration for such monies retained other than the making of the loan, and the amount retained exceeds the legal interest on the loan."

The receipt of this extorted kickback or prepaid interested by Goodman, standing alone, constituted usury under New York law, in that it amount to 10.144 percent per annum and was within the prohibited limits of the usury laws of the State of New York, which prohibited any extraction of interest in excess of 7.25 percent.

Misstatement (5). In the same paragraph, former Justice McCain, continuing his pattern of distortion of fact, states:

> "Thereafter, Olsen repaid $60,000 of the $150,000 loaned to him by Goodman."

This statement, by former Justice McCain, converts the usurious Goodman extortion of $10,000 from Olsen into a payment of principal on the loan when the jury below, on the facts, found it to be usury.

Attached as Exhibit M is a letter dated July 3, 1969 from Goodman's attorney demanding payment from Olsen of $150,000, after which Olsen, on August 1, 1969, paid $50,000 on account. Exhibit N is a subsequent letter from a new Goodman attorney, dated October 3, 1969, demanding payment of the balance of $100,000. Both of these letters are dated after the payment of $10,000 to Goodman on September 23, 1968, Exhibit L, supra. It is thus clear, as determined by the finder of fact below, that in neither instance had Goodman considered

the payment to him of the $10,000 from Olsen a reduction of principal. By statement to this Court in his memorandum, however, former Justice McCain converted the $10,000 payment, coupled with the $50,000 payment on principal into a $60,000 reduction of principal contrary to the finding of fact by the jury.

Misstatement (6). In finishing the sentence as set forth in Misstatement (5) above, former Justice McCain asserts:

> "...and (Olsen) failed to buy back the Omega shares pursuant to the contract."

In the Agreement between the parties, Exhibit O, Goodman reserved for himself a bonus option to require Olsen to purchase the Goodman Omega shares within a specified period of time. An examination of the trial court record, by this Court, will reveal that Goodman never exercised this option and never made the affirmative tender, as required by the Agreement, TT 291-292, Exhibit P. Olsen cannot be charged, to his prejudice, with failure to do what he was not required to do.

Here again, former Justice McCain has misrepresented to this Court a major fact which had been decided by the jury in favor of Olsen, and he further refused to give effect to a substantive defense under the applicable laws of the state of New York, in violation of Olsen's constitutional rights under Articles I and IV of the Constitution of the United States. Bradford Electric Light Co. v. Clapper, 286 U.S. 146; Holderness, et al. v.Hamilton Fire Ins. Co. of New York, S.D. Fla., 54 F.Supp. 145 (1944) and Confederation Life Association v. Uglade, 151 So.2d 315.

Misstatement (7). Under "FACTS," paragraph six, former Justice McCain sets forth the following:

> "Petitioner commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due on the $150,000 loan;. . ."

The trial court and Third District records are clear on this point. The pleadings filed by Goodman in the commence-

ment of this action made a demand for $100,000 as the balance due on the loan, Exhibit Q. This fact is further substantiated by the letters from Goodman's attorneys as hereinabove set forth in Misstatement (5). The statement of the memorandum that the instant litigation contained a claim for $90,000 rather than $100,000 is a wholly unsupported effort by former Justice McCain to support his conversion of the usurious $10,000 payment into a $10,000 payment of principal on the loan and justify his non-factual presentation to this Court.

Misstatement (8). In the same paragraph, hereinabove stated, the memorandum continued:

> "...and the second count for damages for failure to comply with terms of the contract of September 17, 1969, in refusing to buy back the Omega Equities Corporation stock from the Petitioner."

The provision for the purchase of the Goodman stock was treated under Misstatement 5. Goodman never made a demand that Olsen repurchase his stock, Exhibit P, supra. This Court should note that Justice McCain cited two Florida cases. Neither case is factually the same, nor is either governed by or does it apply any law of the State of New York. The cases cited relate to estoppel of an attorney under Florida law to claim usury as a defense where the attorney drafts the agreement on the attorney's terms. In this case, however, it was the lender, Goodman, who dictated the terms of the Agreement, as hereinabove set forth, and as determined by the jury below.

The prevailing view, in New York, as to estoppel by an attorney to claim usury as a defense is set forth in In Re Grotolla's Estate, 124 NYS 2d 85. In this case, an action was brought upon a note and it was contended that the defense of usury was not available in that the maker had been a client of the payee. The Court, in reflecting this position, stated:

> "Counsel for claimant urges that the mandatory statutory provisions should be applied for the reason that the decedent obligor was an attorney and that the obligee was a client of the decedent. While some evidence was adduced to show that an attorney-client relationship had existed between the parties prior to the transaction in question, there is no evidence that the loan was made in connection with any transaction in which such relationship existed at the time nor is there any evidence of fraud in the inception of the loan. The obligee is presumed to know that the legal rate of interest in the statutes of New York is 6%. General Business Law Section 370, 371. The mere fact that the decedent obligor may have represented the obligee in other matters does not estop the legal representative of the obligor from availing herself of the defense of usury."

As established in the trial court, an attorney-client relationship never existed between Olsen and Goodman, TT 156-157, Exhibit R. It is submitted, that to justify his misstatements of facts and issues, former Justice McCain changed the law of the case, as established by the tril court and affirmed by the Third District, to conform to the facts as he erroneously presented them to this Court.

ITEM 6. Exhibit S is another memorandum prepared by former Justice McCain and circulated to the members of this Court, in preparation for Oral Argument. With the exception of three minor changes -- the deletion of a date, the calling of petitioner Goodman and the statement that Olsen was an attorney, the body of the memorandum is identical to the memorandum on jurisdiction and therefore reiterates all of the misstatements, omissions and distortions, as hereinabove set forth.

CONCLUSION

The combination of events in the proceedings before this Court compel the respondent, Olsen, to allege that a fraud was committed on this Court and the respondent herein.

An impartial examination of this Court's heretofore confidential memoranda and documents relating to these cases appears to demonstrate a serious and substantial abuse of the

processes of this Court. It is apparent that it was not contemplated that these confidential memoranda and documents would become a matter of public record abailable for independent inspection. In what he thought to be the sanctuary of confidentiality, it is petitioner's view that former Justice McCain took the liberty to abuse the processes of this Court during a period of disruption and to deceive its members at to the true facts, law and circumstances involved herein.

Respondent, Olsen, has been deprived of his right to due process of law as guaranteed him by the Fourteenth Amendment to the Constitution of the United States. Further, the actions of this Court haveviolated his rights under Articles I and IV of said Constitution by failing to give effect to his contractual rights, valid were made, and performed, and defensively asserted in this cause.

SUMMARY

The respondent, Olsen, respectfully requests this Honorable Court take the portions of the record cited in support of Items 1 through 6 above, and to compare the facts established therein with facts as presented to the members of this Court by former Justice McCain in his briefing memoranda. It is submitted that the comparison will make clear that these memoranda were tailored, not to fit the record but to fit the conclusions former Justice McCain desired this Court to reach. This Court was without jurisdiction to entertain either Case Number 43,168 or Case Number 45,356.

WHEREFORE, respondent, Olsen, respectfully requests this Honorable Court:

1. To issue a Constitutional Stay Writ in Aid of Jurisdiction; to stay the pending Circuit Court action until determination by this Court of this Petition;

2. To review the matters set forth in this Petition as they relate to the records of the trial court and Court of Appeal, Third District;

3. To require the filing or submission of briefs and oral argument in the instant cause, should the Court deem the same necessary to clarify the facts, issues and distortions; and

4. To grant such other relief as the Court may deem just and proper.

Respectfully submitted,

TAYLOR, BRION, BUKER & GREENE
320 Barnett Bank Building
Post Office Box 1796
Tallahassee, Florida 32302
ATTORNEYS FOR RESPONDENT

By _____
WILBUR E. BREWTON

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Leo Greenfield, Esquire, 1680 N.E. 135th Street, North Miami, Florida 33161, by U.S. Mail this 29th day of June, 1976.

_____
Attorney

AFFIDAVIT

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

BEFORE ME this day personally appeared RICHARD H. OLSEN, who being duly sworn, states:

I, RICHARD H. OLSEN, respondent in the case herein, have reviewed the contents of the Petition for Constitutional Writ filed on my behalf and I do state that the allegations contained therein are true and correct to the best of my knowledge and belief and have been furnished to my counsel of record by me for inclusion in this Petition for Constitutional Writ.

RICHARD H. OLSEN

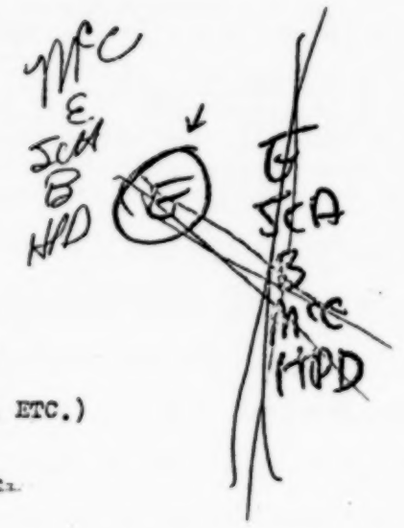
SWORN and SUBSCRIBED before me this 24th day of June, 1976.

Notary Public, State of Florida
My Commission expires:

Exhibit A

CASE NO. 43,168

GOODMAN, SAUL,
Petitioner,
vs.
OLSEN, RICHARD H.,
Respondent.



R E M A R K S

(MOTIONS, PETITIONS, ETC.)

PETITION FOR REHEARING

Grant	Deny
B	

Exhibit B

DETERMINATION OF JURISDICTION
CERTIORARI - DCA 3

SAUL GOODMAN -vs- RICHARD H. OLSEN No. 43,168

STATUS: Petition for writ of certiorari to DCA 3.

FACTS: On June 23, 1972, the Petitioner (plaintiff below) filed an appeal from the 11th Judicial Circuit Court orders dated March 16 and May 31, 1972.

On Sept. 28, 1972 the Respondent filed his brief on the merits of the appeal. On Oct. 19, 1972 the Respondent filed a motion to dismiss the appeal, arguing that the Petitioner had not filed his brief within the time allowed by the Appellate Rules.

On Nov. 2, 1972 the Petitioner filed a "Motion for Leave of Court to File Appellant's Brief" wherein he explained his delay in filing a brief and attaching an affidavit executed by his secretary. On Nov. 13, 1972 oral argument was heard on this motion and Petitioner filed his brief as of that date.

On Nov. 17, 1972 the DCA 3 entered its order denying Petitioner's motion and granting Respondent's motion dismissing the appeal. It is from this order that Petitioner files his petition for writ of certiorari.

ISSUE: Whether Petitioner's allegation of conflict between the DCA 3 decision below and Hector Supply Co. Inc. v. Carter, 122 So.2d 22, 3dDCA 1966, is a relevant consideration when the petition is presented under Art. V, Sect. 4, Fla. Const.

DISCUSSION: Art. V, Sect. 4, of the Fla. Const. provides in part:

> "The supreme court may review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law. . . ."

Since Petitioner is alleging conflict between two DCA/decisions, no jurisdiction can rest with this court under the petition as presented.

In his brief, Petitioner also cites Baker-Lewis Construction Co. v. Midyette, 141 So. 534, Fla. 1932, for the proposition that by failing t grant Petitioner's motion, the DCA 3 abused its discretion. The facts

1....

in Baker reveal ". . . a course of indulgence between counsel as to the filing of briefs . . ." together with a voluntary stipulation as to the time when the opposing party's brief could be timely filed. In Baker, counsel met that stipulated deadline.

There is no conflict with Baker since there was no "course of indulgence" here and no adhered to stipulation between counsel as to timely filing.

RECOMMENDATION: Deny.

/c

...2

Exhibit C DETERMINATION OF JURISDICTION
CERTIORARI

IN THE SUPREME COURT OF FLORIDA

CASE NO: 43168

FILED
DEC 19 1972
CLERK SUPREME COURT

SAUL GOODMAN, :
Petitioner, : PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
vs :
RICHARD H. OLSEN, :
Respondent. :

TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, SAUL GOODMAN, presents this, his Petition for Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an order of the District Court of Appeal, Third District, dated the 17th day of November, 1972, and filed in the records of said District Court on the same date in Minute Book 47, Page 131.

2. This Petition is presented under and pursuant to Article 5, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This Petition is accompanied by a transcript of so much of the proceedings as Petitioner seeks to have reviewed including the decision Petitioner seeks to have reviewed together with a true and correct copy of the Transcript of Testimony. Since a certified copy of the Transcript of Testimony was heretofore delivered to Appellee counsel we are not delivering the Appellee an additional Transcript of Testimony but only that portion of the Trans-

Exhibit D

DETERMINATION OF JURISDICTION
ON REASSIGNMENT
FEBRUARY 5, 1973

STYLE: Goodman v. Olsen #43,168

STATUS: Conflict certiorari to DCA-3

FACTS: This involves a procedural matter and apparent conflict with decisions within the DCA-3, which by construction of new Article V, we have agreed is reviewable if there is conflict. (The petition was before us on effective date of Article V.)

Petitioner filed a timely notice of appeal with DCA-3 on June 23, 1972. Petitioner then failed to file a brief. On Sept. 28, respondent filed his brief on the merits, and on Oct. 19 filed a motion to dismiss. On Nov. 2 petitioner filed a motion for leave to file and explained his delay with supporting affidavits. On Nov. 13 oral argument before the DCA was held upon the motion. Petitioner filed his brief at the court's suggestion on that date. On Nov. 17 the DCA denied petitioner's motion and granted respondent's motion to dismiss.

Conflict certiorari to us followed.

In Hector Supply Co. v. Carter, Fla. App. 1960, 122 So. 2d 22, (also a DCA-3), the appellant did not file his brief in conformity with the rules. Appellee filed his brief and in it also argued that the appeal should be dismissed. The DCA there ruled that since the appellee filed his brief first (not choosing to first file a motion to dismiss) then appellee's argument was untimely and the issues on appeal would be heard even though appellant had not filed a supporting brief.

Thus, the rationale of Hector gives us conflict. In both cases, appellants did not file briefs (sub judice, appellant did later file a brief), and in both cases the appellees filed briefs on the merits. In Hector, the appellee raised the issue of dismissal in his brief on the merits, whereas, sub judice it was raised by separate motion subsequent to appellee's filing of brief. This makes the case under review even stronger for conflict.

RECOMMENDATION: Grant certiorari and waive oral argument. The record is simple.*

* Without attempting to go to the merits, the record proper indicates a fairly strong case for petitioner, i.e. (1) no showing of prejudice to respondent due to petitioner's tardiness in filing brief, (2) internal mix-up between lawyers, and (3) brief was finally filed by petitioner.

DLM:w

Exhibit E

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1972
FRIDAY, NOVEMBER 17, 1972

SAUL GOODMAN,
Appellant,
vs.
RICHARD H. OLSEN,
Appellee.

CASE NO. 72-798

This cause having come on for hearing upon appellee's motion to dismiss appeal and appellant's motion to file appellant's brief, and the court having considered same, it is ordered that appellant's motion to file brief is denied, appellee's motion to dismiss is granted and this appeal from the Circuit Court of Dade County, Florida (#70-2149) be and the same is hereby dismissed.

A True Copy

ATTEST:

Clerk District Court of
Appeal, Third District

cc: Prunty, Ross, DeLoach & Olsen
Ragano & LaPorte
Gene Williams
E. B. Leatherman

/h

Exhibit F

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO: 72-798

SAUL GOODMAN,
Appellant,
vs
RICHARD H. OLSEN,
Appellee.

PETITION FOR REHEARING

Appellant, SAUL GOODMAN, presents this his Petition for Rehearing of the Decision of this Honorable Court filed November 17, 1972, granting Appellee's Motion to Dismiss the Appeal, and in support thereof respectfully shows unto the Court:

1. That this Honorable Court must have overlooked and failed to consider the fact that the Appellee waived whatever rights he may have had to have the above entitled cause dismissed when he filed Appellee's brief going to the merits of the appeal on September 28, 1972 and not filing the Motion tc Dismiss Appeal or Affirm Judgment until October 19, 1972.

2. This Honorable Court must have overlooked and failed to consider its own opinion in the case of Hector Supply Co. v Carter, 122 So.2d 22, wherein no motion was presented by the Appellee to this Court to require Appellant to file a brief in conformity with Florida Appellate Rules or suffer a dismissal of its appeal, but Appellee chose to wait until filing of his brief and therein argued the appeal should be affirmed because of violation of such rule, this Court ruled that the Appellee's motion was untimely and agreed to review the case.

WHEREFORE, Appellant prays that this Petition for Rehearing be granted and that this Court modify its decision and allow the Appellant to file his brief and consider the case on its merits.

Respectfully submitted,

RAGANO & La PORTE
Counsel for Appellant
Suite 400 - 26 West Flagler Street
Miami, Florida 33130

By FRANK RAGANO

Exhibit G

SUPREME COURT OF FLORIDA

Progress Docket

CONFIDENTIAL

GOODMAN, SAUL

Key Name

Case No. 45356

CERT. DCA-3 DADE COUNTY
Jurisdiction

APRIL 10, 1974
Date Filed

11-7-74 Opinion
Disposition

12-9-74
Petition for Rehearing Filed

1-29-75 denied
Disposition

ATTORNEYS

LEO GREENFIELD - North Miami

ATTORNEYS

PRUNTY, ROSS, DeLOACH & OLSEN
Miami

Parties

SAUL GOODMAN,
Petitioner,
vs
RICHARD H. OLSEN,
Respondent.

Pet. FEB 23 1974

DETERMINATION OF: JURISDICTION – ORAL ARGUMENT

JUSTICE	DATE
MCC	MAY 23 1974
HPD	✓
O	JUN 5 1974
SCA	JUN 12 1974
R	MAY 28 1974

DISPOSITION: Pet. for WD Enty 6-14-74

MOTION:

JUSTICE	DATE

DISPOSITION:

ORAL ARGUMENT: 9-13-74 (MCC 7-10-74)

JUSTICE	DATE
R	SEP 25 1974
E	OCT 4 1974
B	NOV 6 1974
MCC	9-16-74
BFO	OCT 7 1974

DISPOSITION:

Grd to Deny 12-16-74

REHEARING: 12-9-74

JUSTICE	DATE
R	[illegible] JAN 7 1975
E	JAN 10 1975
B	
MCC	DEC 19 197[illegible]
BFO	JAN 13 1975
[illegible]	JAN 27 1975

DISPOSITION: [illegible]

JUSTICE	DATE

DISPOSITION:

Exhibit H

DETERMINATION OF JURISDICTION
CERTIORARI

STYLE: SAUL GOODMAN v. RICHARD H. OLSEN
Case No. 45,356

STATUS: Petition for writ of certiorari to the District Court of Appeal, Third District. 291 So.2d 71.

FACTS: On September 17, 1968, Goodman and Olsen entered into an investment contract related to a business venture. Olsen prepared and wrote in his own hand a contract under the terms of which Goodman agreed to put up $300,000 of which Olsen would borrow $150,000, the total to be used to purchase 50,000 shares of Omega Equities, Incorporated. Each party was to own 25,000 shares, with Olsen's 25,000 shares pledged as collateral on the $150,000 loan from Goodman.

In the contract, Olsen agreed to repay the $150,000 loan by May 13, 1969, and further agreed to purchase Goodman's 25,000 shares at $10 per share should he desire to sell. This purchase was to take place between October 31, 1969, and December 31, 1969. In the event Olsen failed to pay the purchase price of the stock within ten days from the tender of it, Goodman could sell the shares and Olsen would be liable to him for any sums less than $10 per share.

Olsen also agreed not to sell any of his shares prior to December 31, 1969, without Goodman's prior written consent unless all of his obligation to Goodman in the venture were satisifed. Further, Olsen agreed to take out a $400,000 life insurance policy payable to Goodman, with Olsen paying the premiums, such policy to remain in good standing until the conclusion of the agreement.

The final written understanding between the parties was that the shares were to be held jointly and that the shares were to be 50,000 of a 100,000 share certificate. The other 50,000 shares were to be held by the parties as Trustees until registration, at which time they were to be registered in the respective owners' names. Also, at the time of the registration, the 50,000 owned by the parties were to be registered, 25,000 shares in Goodman's name, and in the event Olsen had any obligation still due and owing to Goodman, 25,000 shares in their joint names, otherwise 25,000 in Olsen's name.

On September 18, 1968, Goodman delivered to Olsen a check in the amount of the contract, i.e., $300,000. Thereafter, Olsen repaid $60,000 of the $150,000 loaned to him by Goodman. Olsen failed to repay the balance due on the $150,000 loan when due on May 31, 1969, and failed to buy back the Omega shares pursuant to the contract.

Petitioner commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due of the $150,000 loan; and the second count for damages for failure to comply with terms of the contract of September 17, 1969, in refusing to buy back the Omega Equities Corporation stock from the petitioner. Olsen interposed in his Answer the affirmative defense of usury. After a jury trial, petitioner moved for directed verdict, which motion was denied. Certain instructions were given to the jury as to the law of the case over the objections of petitioner, inasmuch as the instructions given failed to adequately apprise the jury that an attorney, who prepares a note for a lender from whom he has borrowed money, is estopped to assert the affirmative defense of usury when sued on the note, whether or not said attorney is also an attorney employed by the lender, or is simply an attorney-borrower from the layman. The jury's verdict on said instructions was for the respondent, whereupon the petitioner filed Motion for Judgment in Accordance with Motion for Directed Verdict; or in the Alternative, For A New Trial, both of which motions were denied by the trial court.

On appeal, the Third District Court affirmed per curiam with a series of cases cited in support thereof, no opinion.

ISSUE: Whether or not the decision of the Third District Court is in conflict with In State of Florida, Ex Rel. The Florida Bar v. Delves, 160 So.2d 114 (Fla.1963) and The Florida Bar v. Pitts, 219 So.2d 427 (Fla.1969), on the question of estoppel to claim usury as a defense and the trial court's instructions to the jury on usury.

DISCUSSION: In the Delves case, involving a disciplinary proceeding, this Court held that the conduct of an attorney in furnishing a defective instrument to laymen from whom the attorney obtained a substantial loan and in thereafter filing his affidavit in a suit by laymen to enforce the note, charging that the note was usurious and at least partially unenforceable, warranted suspension. Delves had raised the affirmative defense of usury when suit was filed to enforce payment of the note. In deciding to increase the punishment of reprimand ordered by the Board of Governors of the Florida Bar to a twelve month suspension, the court quoted from the judgment:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note, was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the Bar can only bring discredit upon the entire profession."
> 160 So.2d 114, 115.

In the Pitts case, the same principle was restated that where suspension from the practice of law is based on borrowing a substantial sum of money from a client at a usurious rate and then pleading usury as a defense to a suit on the note, restitution or at least arrangements for restitution satisfactory to the client should be the condition to reinstatement. The Delves case was cited with approval in Pitts, supra,

Petitioner contends that the principle laid down in Delves and supported by the Pitts case estops the attorney-defendant being sued on a note from claiming usury as a defense as a matter of law; and further, that in the event such litigation reached a jury, it should be on appropriate instructions that the principle in the Delves case was in fact the controlling law.

Respondent contends that both Delves, supra, and Pitts, supra, are wholly and completely involved in a construction and interpretation of the Integration Rule of the Florida Bar and have not the remotest relation to or similarity with any of the issues presented in the case sub judice.

RECOMMENDATION: Grant Cert. Clear, the respondent is a practicing attorney and the rationale of the foregoing cases clearly apply, sub judice, as enforced by the jury instructions, contract, etc.
Mac

Exhibit I

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 70-2149 (Williams)

SAUL GOODMAN,

Plaintiff,

vs.

RICHARD H. OLSEN,

Defendant.

REPLY TO AMENDED ANSWER

COMES NOW SAUL GOODMAN, Plaintiff, by and through his undersigned attorneys, and files this his Reply to the Amended Answer of the Defendant, and says:

1. The Plaintiff denies the allegations of the Answer and the Amended Answer with the exception that he admits that the transaction between the Plaintiff and Defendant, as reflected by Plaintiff's Exhibit (1), occurred in New York City and that New York law would apply.

2. That the Defendant is estopped to plead usury as a defense as attempted in his Answer and his Amended Answer in that the Defendant was an attorney at law and in a fiduciary capacity to the Plaintiff at the time of the execution of the agreement; that the Defendant drafted the agreement; that the agreement was the work product of the Defendant and not that of the Plaintiff; the Defendant represented to the Plaintiff that it was a valid and legally binding agreement; and the Plaintiff changed his position, to his detriment, upon the representations of the Defendant.

3. That the Defendant has waived his right to plead the defense of usury as attempted in his Amended Answer

4. That the attempted defense of usury by the Defendant is barred by the statute of limitations and/or laches.

5. That the attempted affirmative relief contained in paragraph (8) of the Amended Answer is also barred because of the failure of the Defendant to include such requested relief at the time of serving his answer, as required by 1.170 of the Florida Rules of Civil Procedure.

RAGANO & LaPORTE

BY:_____
RAYMOND E. LaPORTE
408 Madison Street
Tampa, Florida 33602
Counsel for Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to John W. Prunty, Esq. of Prunty, Ross and Olsen, 837 City National Bank Bldg., Miami, Florida this 29th day of February, 1972.

Exhibit J

Q Was there a discussion with him at that time?

A Yes, sir. We were discussing the drafting of an agreement for the purchase of the Omega stock.

Q Did the discussion culminate in the agreement, which is Plaintiff's Exhibit 1?

A Well, yes, sir, a portion of it.

Q Let me show you Plaintiff's Exhibit 1. You say a portion of it? Well, were there some matters that were not incorporated in there?

A Just by way of reference, yes, sir.

Q Now, will you look at the agreement, please? That is in your handwriting, isn't it?

A Yes, sir, it is.

Q Whose idea was it that this be reduced to writing?

(Olsen) A Well, Mr. Goodman--I had met with Mr. Goodman in the morning at the Hampshire House, and he informed me that he had a lady by the name of Jean Taylor Jackson coming, and that she was his attorney and had represented him on other matters, and he wanted her there to go over the contract.

We had a discussion as to this, and he said, "You know, I am not going to go into this

agreement unless I can make a guaranteed profit on this thing."

We talked about what the guaranteed profit would be, because my idea of doing this was to permit him to come into the transaction because the stock was selling at somewhere--fifty percent discount, that that would be adequate consideration for letting him purchase 25,000 shares of the stock.

But he wasn't happy with this. He said that he had to have a definite profit in this, and that this resulted in the paragraph which developed around the buy-back provision.

Q Yes. Whose idea was it to reduce this to writing?

A Well, subsequent to that conversation, Miss or Mrs. Taylor arrived, and then we adjourned downstairs at the Hampshire House to lunch. This contract and the entire transaction was discussed over lunch.

We went back upstairs and had further discussion, and to the best of my recollection, we adjourned from there and went to Miss Taylor's office, and they had requested that I write out the contract.

Q Who is, "They requested that you write out the contract"?

A Well, Mr. Goodman and Miss Jackson.

Q Mr. who?

A Mr. Goodman and Miss Jackson.

Q Now, was Miss Jackson present during the discussions that you had prior to writing out the contract?

A She was present at some of the discussions in the contract, but she was not present during the earlier discussions prior to lunch.

Q Was she present at the time that you wrote out the contract?

A Yes, sir.

Q Now, how did you go about writing that out? Did you write up the whole thing and say, "Here it is," and hand it to them? Or was it written paragraph by paragraph?

A It was written paragraph by paragraph.

Q And what do you mean? You would write one paragraph, and then what would you do?

A I would write a paragraph. I would read the paragraph and then ask, "Is this correct?" They would say, "Yes," and I would go on to the next.

Q Who would say yes?

A Well, Mr. Goodman and Miss Jackson.

Q Did Miss Jackson make any suggestions

in the course of your preparation of this Plaintiff's Exhibit 1? Did she make any statements about it?

A No. She didn't make any suggestions on the agreement that I can recall. There was discussion back and forth between Miss Jackson and myself and Mr. Goodman, and myself and Mr. Goodman and Miss Jackson during the drafting of the entire agreement.

Q And each paragraph, you say, was read to Mr. Goodman and to Miss Jackson at the time it was prepared?

A Yes, sir.

Q And at the conclusion, did Mr. Goodman have any objections to this contract?

A No, sir.

Q What was done with the contract when you had completed it?

A The contract was turned over to Mr. Goodman, and I was to get a copy of it because this was the only copy. I didn't get the copy until--I think it was a month or two months later.

Q Now, you stated that he said he would not go forward with the agreement unless he was guaranteed a return?

A Yes, sir.

Q And is that why you put in the paragraph

to repurchase this stock at $10 per share, which was $4 per share more than he was paying for it?

A Yes, sir.

MR. RAGANO: We object to counsel leading the witness.

MR. PRUNTY: It is on cross examination.

THE COURT: He is on cross examination.

Q (By Mr. Prunty) Now, was there any discussion of the mechanics of the acquisition of the shares of stock?

A Yes, sir, there was.

Q What was that discussion?

A Well, Omega Equities Corporation had asked or requested that because there were approximately ten people involved in this transaction, others besides Mr. Goodman and myself, that we try to put the stock certificate in one name, or in a company name, preferably.

Mr. Goodman was apprised of this, and I told him that I had a friend who was a president of a company called Landrich Investment that had dealt in lettered stock before, and that this stock certificate, if he had no objections on it, that we would have the stock issued into the name of Landrich Investment, and have the appropriate stock transfer powers; and, at

company, and whom I had known for several years, had asked me about investment letter stock and opinions about transfer of stock, and I knew the company had dealt with investment letter stock.

Q Now, who actually had requested that this agreement, Plaintiff's Exhibit 1, be prepared and drawn?

(Olsen) A Mr. Goodman did.

Q Where was that, sir?

A The first knowledge of putting the agreement in writing was after I arrived in New York, and it was at the meeting with Jean Jackson, originally at the Hampshire House.

Q Now, this might be construed as somewhat of an informal agreement, since it is in your handwriting. Were you willing to enter into a more formal agreement if requested?

A Yes, sir. I had no objections and advised him as such.

Q Now, why was the paragraph included in the agreement which provided that you must buy back Mr. Goodman's stock at $10 per share?

A Mr. Goodman insisted that it be put in the agreement to guarantee a repurchase of the stock so he could make a profit. Otherwise, he would not

loan the money.

Q Did he state how much profit he wanted?

A $100,000.

Q Was that a condition to making the loan?

A It was an absolute condition.

Q Now, Mr. Goodman has stated that he wanted nothing in return for the loan; is that correct?

A No, sir, that's incorrect. I wouldn't give him $100,000, or commit myself to a hundred thousand dollar payment just to give it away.

He had stated that it must go into the agreement, and he wanted it in writing, because the original discussion on this was a simple note from me for $150,000, which I was to give him, and when I got up there he changed.

He said, "I want this in writing," and that was the result, the agreement that was drafted.

Q Have you computed what the rate of interest on $100,000 would be on this transaction?

A Yes, sir. That loan was for eight months and thirteen days, and the interest comes out to--I believe it's 107.84 per cent.

Q That is on $150,000?

A Yes, sir.

not been guaranteed by some bank or other institution. Is that necessary in order to perfect an assignment of stock?

A No, sir, it is not. It may be requested, but it has not been requested.

Q Do you recall whether or not Mr. Goodman ever asked you to have that signature guaranteed by anyone?

A No, sir.

Q Now, sir, after you received the check, which has been referred to as Plaintiff's Exhibit 3, and you delivered that to Onega Equities, what did you do then? Did you come back to Miami?

(Olsen) A Yes, sir. I returned to Miami.

Q Did you subsequently receive a call from Mr. Goodman?

A Yes, sir. Mr. Goodman called my apartment and I was out. My wife took a message.

Q Did you talk with Mr. Goodman, and what did he say about the transaction?

A Subsequently I called Mr. Goodman back, and he turned around and he said, "I've changed my mind about the whole deal. I'm not making enough money. I want $25,000 more."

I told him, "There is no way I can

raise $25,000, and this is what you agreed to do."

We argued back and forth on it, and he said, "Well, my mind is made up." He said, "I've just run out of money. I want $25,000 more interest, or you can forget the whole thing. I've put a stop payment on the check."

I said, "You can't put a stop payment on the check because there are funds of other people that have been paid into the company, and what you would be doing is putting all of these other people into jeopardy."

He said, "I don't care about the other people. I am not going to go through with it unless I get $25,000."

I tried to reason with him, and he wanted the money immediately, and there was just no way I could raise that.

So I told him that I could possibly get him $10,000 by Monday. He said, "All right. Send me the $10,000 immediately. Wire it. And if I don't get it, the stop payment will stay on and the deal will fall through."

Q I hand you this document and ask you if this is a copy of the wire of the funds of $10,000 to Mr. Goodman, and if you will give us the date on it.

A Yes, sir. This is a copy of a Western Union telegraphic money order, dated September 23rd at 2:37 p.m. It went to Saul Goodman, care of Hampshire House, 150 Central Park South, New York. It says:

"Saul, As per our telephone conversation, here is the money you requested re Omega Equities stock. Happy New Year. Best regards."

MR. PRUNTY: I would like to have this marked for identification.

MR. LaPORTE: No objection.

MR. PRUNTY: We will offer it then as a defendant's exhibit.

(The document referred to was thereupon marked "Defendant's Exhibit A.")

Q (By Mr. Prunty) Let's see if I understand you correctly. The money or the $10,000 which you wired to Mr. Goodman, as reflected by the copy, Defendant's Exhibit A, was that demanded as a return of part of the money, or was that a demand of additional profit or interest?

MR. LaPORTE: Judge, he just gave the discussion. I don't think he should then be able to

categorize it by his opinion as to what it is.

THE COURT: Sustained.

Q (By Mr. Prunty) What did Mr. Goodman say with reference to this money, how it was to be applied?

MR. LaPORTE: Repetitious. He just got through giving the discussion about this. Now he wants to go back and ask questions and have him answer--

THE COURT: Well, overruled.

(Olsen) THE WITNESS? Mr. Goodman had requested that I send him the money as additional consideration for the transaction. He had originally requested the $25,000, which I could not raise.

Q (By Mr. Prunty) This was not any repayment of any part of the loan?

A No, sir. It was not to be applied to the loan.

Q Now, subsequently on July the 3rd, on July 3, 1969, did you receive a communication from a lawyer by the name of Marion E. Sibley?

A Yes, sir, I did.

Q I show you this document and ask you if that is a copy of the communication you received?

A Yes, sir.

MR. LaPORTE: No objection.

Dick said that he investigated the stock a little further, that the stock looked good, it was going up, and that some of the mutual funds were also interested and were purchasing some of the Omega, so it looked like it was a strong stock and a good investment.

Q What was Mr. Goodman's reaction to that?

A Well, he was very interested in the stock, and he told Dick before he did anything further about it, to please let him know, and then Mr. Goodman--There was one other time that we saw Mr. Goodman. It was right before he was ready to go back to New York, and he brought up the subject of Omega, it again came up, and he said, "Please, before you do anything about it, talk to me in New York."

Q Did your husband go to New York in connection with the Omega Equities deal, if you know?

Mrs. Olsen A Yes. My husband and Mr. Goodman talked over the phone several times, and then my husband went on up to New York.

Q Your husband went to New York and returned--he returned to Miami, then?

A Yes.

Q Did you receive a phone call from Mr.

Goodman?

Mrs. Olsen A Yes. One afternoon, Mr. Goodman called and my husband had not returned home yet, and he asked me to give my husband a message, that he had decided that he did not want to go through with the deal, and I asked him why, and he said because he wasn't making enough money, and he also told me that he had stopped payment on the check and to please give this message to my husband.

Q Did he state whether or not he wanted any money or did he just stop payment on the check?

Mrs. Olsen A Well, he just said he wasn't making enough money off of the deal.

Q And did you relate this conversation to your husband?

Mrs. Olsen A Yes. When my husband came on home, I told him exactly what Mr. Goodman told me.

Q What he do about it, if you know?

Mrs. Olsen A Well, Richard was quite upset, and he got on the phone right away and tried to reach Mr. Goodman, which he did.

Q Did you see the plaintiff again after that situation; that is, Mr. Goodman, did you see him again?

A Yes. I saw Mr. Goodman, I believe,

Exhibit L

THE WESTERN UNION TELEGRAPH COMPANY

TELEGRAPHIC

MONEY ORDER RECEIPT

WESTERN UNION TELEGRAPH CO.
PAID
BY [illegible]

AMT.	9921.71
CHGS.	74.15
TOLLS	4.14
TAX	
TOTAL	10000.00

[illegible] 11 [illegible] mx Miami [illegible] 1968 SEP 23 PM 2 37
[illegible] NYK

AMOUNT: Nine thousand nine hundred twenty one and 71 cents (9921.71) call

TO: SAUL GOODMAN - care HAMPSHIRE HOUSE

AT: 150 CENTRAL PARK SOUTH New York, New YORK

FROM: Judge Richard H. Olsen

SAUL - AS PER OUR Telephone conversations here is the money you [illegible] RE: The [illegible] Equities stock - Merry New Year AND Best Regards. - Dick

Judge Richard H. Olsen (FULL NAME)

Palm Bay Club - Miami (SENDER'S ADDRESS) 751-0251 (TELEPHONE NUMBER)

Exhibit M

July 3, 1969

Mr. Richard H. Olsen
Palm Bay Club
1 Palm Bay Court
Miami, Florida

Dear Mr. Olsen:

We represent Saul Goodman to whom you are indebted in the sum of $150,000.00, which became due and payable on May 31, 1969.

Will you kindly make arrangements to make this payment in order to save yourself future embarrassment.

Very truly yours,

Marion E. Sibley

MES/kos

Pltf's exhibit B for ID
[illegible] 5/26/71

RAPHAEL K. YURES
SUITE 257
TELEPHONE 538-7063
AREA CODE 305

MERCANTILE NATIONAL BANK BUILDING
420 LINCOLN ROAD
MIAMI BEACH, FLORIDA 33139

Exhibit N

October 3, 1969

DEFENDANT'S EX. (C)
Filed 3/15- AD 1972
Case No. 70-2149
E B LEATHERMAN
Clerk Circuit Court

A-1
3/15-72
70-2149

Mr. Richard H. Olsen
Palm Bay Club
1 Palm Bay Court
Miami, Florida 33135

Dear Mr. Olsen:

I represent Saul Goodman who has turned over to me for immediate attention your indebtedness to him in the sum of $100,000.00. I have been advised that $150,000.00 was due and payable on May 31, 1969 and that you made a $50,000.00 partial payment against the sum due Mr. Goodman by you, leaving a balance of $100,000.00.

Please see to it that the sum of $100,000.00 is paid within 5 days from date hereof since I have instructions to proceed for the collection in the event payment is not made within 5 days.

Very truly yours,

RAPHAEL K. YURES

RKY/hs

Exhibit O

Mr Saul Goodman
Hampshire House
New York, New York

Dear Saul:

As per our joint venture it is agreed that you shall put up the sum of $ 300,000 of which sum I am borrowing $ 150,000. Said funds shall be used to purchase 50,000 shares of Omega Equities Inc common stock under an investment letter. You shall own 25,000 of these shares and I shall own the other 25,000 which I pledge to you as collateral on the above loan.

I agree to repay the above $ 150,000 to you by May 31st, 1969. I further agree to purchase from you, in the event you decide to sell to me, your 25,000 shares of the above stock at a price of $ 10,00 per share. Said purchase to take place between October 1, 1969 and December 31, 1969. In the event I fail to pay you the purchase price of said stock within 10 days from tender of same you may sell said shares and I shall be liable to you for any sums less than $ 10,00 per share.

I agree not to sell any of my shares prior to December 31, 1969 without your prior written consent unless all my obligations to you in this joint venture have been satisfied.

I agree to take out a life insurance policy in the sum of $ 750,000 naming you as sole beneficiary and policy to stay in good standing until the completion of

this agreement. I shall pay all taxes on said policy and you shall be the owner of same.

It is understood that said shares of Group stock shall be held jointly by us as trustee and that said stock shall be 50,000 shares of a 125,000 share certificate. The said 50,000 shares shall be held by us as trustee until negotiation at which time they shall be registered in the respective owners names. At time of negotiation the 50,000 owned by us shall be negotiated 25,000 shares in your name and in the event I have an obligation still due and owing to you 25,000 shares in our joint names, otherwise in my name.

Very truly yours

Richard H Olsen.
Palm Bay Club
Miami, Fla 33138

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Exhibit P

THE COURT: He is not trying to do that. He is reading a part of a deposition.

MR. LaPORTE: We still stand on our objection, your Honor.

THE COURT: All right. Bring the jury in.

(Thereupon the jury returned to the courtroom, and the following proceedings were had:)

THE COURT: Members of the jury, the Court has allowed the defense to reopen its case to read another case of the plaintiff's deposition.

MR. PRUNTY: I desire, with the Court's permission, to read from a deposition of Saul Goodman, taken on June 24, 1971, the following questions and answers, the questions being addressed to Mr. Goodman:

"Q Have you made any demands on Mr. Olsen to repurchase the 25,000 shares of stock which appear to be in your name?

"A Have I made any demands on him, sir?

"Q Yes.

"A No, sir.

"Q You do not desire that he repurchase that stock from you?

P 31

"A I would like him to pay me back.

"Q Have you ever asked him to repurchase the stock?

"A No, sir.

"Q At no time?

"A At no time."

That is all, your Honor.

THE COURT: All right. Take the jury out then.

(Thereupon the jury retired from the courtroom, and the following proceedings were had:)

MR. LaPORTE: We would renew our motion for a directed verdict, if the Court please. The clear language of every case that I found in New York and in the digest, as late as 1950, which was Shepardized, states that for the usury to be a defense that both parties must have had the corrupt intent to take illegal interest, and that is what each one--every one of those statements states that I have left with the Court.

Not only has not both parties had no corrupt intent, but neither one--but certainly we can rely upon, for the purpose of a motion for a directed

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Exhibit Q

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 70 2149

SAUL GOODMAN,

Plaintiff,

vs.

RICHARD H. OLSEN,

Defendant.

COMPLAINT TO FORECLOSE PLEDGE AND OTHER RELIEF

Plaintiff, SAUL GOODMAN, sues Defendant, RICHARD H. OLSEN, and alleges:

1. On September 17, 1968, Defendant induced Plaintiff to advance the sum of $300,000.00 to be used in the purchase of 50,000 shares of Omega Equities, Inc. common stock; Defendant borrowed $150,000.00 of the $300,000.00 advanced and out of the 50,000 shares purchased Plaintiff was to own 25,000 shares and Defendant 25,000 shares, the shares of Defendant to be pledged as collateral for the loan to him of $150,000.00, all as is more particularly set out in the letter dated September 17, 1968, a copy of which is attached, made a part hereof and marked Plaintiff's Exhibit 1.

2. As an inducement to Plaintiff and in furtherance of a scheme or device to obtain the sum of $300,000.00 from Plaintiff, the Defendant represented that the 50,000 shares of stock referred to above was part of a 100,000 stock certificate, and the said 50,000 shares being purchased with the funds advanced by Plaintiff were to be held jointly by Plaintiff and Defendant; that contrary to the representations of Defendant, the 50,000 shares purchased with Plaintiff's funds became a part of an 80,000 share certificate issued by Omega Equities Corporation, being Certificate No. AU41848, and the certificate was issued to Landrich Investment Company, Limited, as owner; a copy of said stock certificate is attached hereto and marked Plaintiff's

Exhibit 2.

3. Landrich Investment Company, Limited by an assignment separate from certificate appears to have attempted to assign 50,000 shares of the said 80,000 shares to RICHARD H. OLSEN, as Trustee, or in the event of his death or disablement, SAUL GOODMAN, as Trustee, a copy of said instrument is attached hereto, made a part hereof and marked Plaintiff's Exhibit 3.

4. RICHARD H. OLSEN, as Trustee, by an assignment separate from certificate appears to have attempted to assign the said 50,000 shares to SAUL GOODMAN and RICHARD H. OLSEN, as Trustees, a copy of this instrument is attached hereto, made a part hereof and marked Plaintiff's Exhibit 4; that it affirmatively appears from the legend written on the said stock certificate, Plaintiff's Exhibit 2, that the alleged assignments were ineffective to transfer 50,000 shares out of the 80,000 share certificate.

5. On May 31, 1969 the sum of $150,000.00 became due on account of the said loan referred to in Plaintiff's Exhibit 1; that upon failure of Defendant to pay when due, demand for payment was made and Defendant paid Plaintiff $50,000.00 on account of said indebtedness; that demand for the balance of said loan in the sum of $100,000.00 was made and although the Defendant admitted and acknowledged his indebtedness, he has failed and neglected to pay the same.

6. That Defendant as a further inducement for Plaintiff to advance the sum of $300,000.00 warranted and represented unto Plaintiff that he would indemnify and save harmless Plaintiff for any losses he may incur in Plaintiff's purchase of 25,000 shares of said stock and Defendant further stated that he would purchase Plaintiff's stock at a price of $10.00 per share between October 1 and December 31, 1969; that the said stock never came

out of registration and Plaintiff was not delivered any stock whatsoever as provided in said letter, Plaintiff's Exhibit 1; that Defendant advised Plaintiff that Omega Equities Corporation was having difficulties registering the said stock and that Defendant was unable to comply with the conditions of his letter, Plaintiff's Exhibit 1; that Plaintiff made demand for the payment to him of the sum of $150,000.00, being the sum advanced for the payment of 25,000 shares of said stock, and although the Defendant at all times acknowledged that he was indebted to Plaintiff in the sum of $150,000.00 on account of the repurchase of Plaintiff's interest in said 25,000 shares of stock, the Defendant stated that he was unable to pay the same due to severe financial losses he suffered in the market.

7. That the Defendant is in default under the provisions of his letter, Plaintiff's Exhibit 1, and there is presently due and owing by Defendant to Plaintiff the sum of $100,000.00 due under the said loan and the sum of $150,000.00 due on the purchase of 25,000 shares of the said stock; Defendant failed to [illegible] a life insurance policy in the sum of $400,000.00 as required by the provisions of Plaintiff's Exhibit 1.

WHEREFORE, Plaintiff demands:

1. An accounting of the sum due Plaintiff under the loan and pledge, and if the sum is not paid within a short time to be [illegible] by the Court, that the interest of Defendant in the said 25,000 shares of stock pledged be sold to satisfy Plaintiff's claim under the pledge, and if the proceeds of the sale are insufficient to pay Plaintiff's claim that a deficiency judgment be entered for the sum remaining unpaid against Defendant.

2. That the Court determine that the Defendant be required to purchase Plaintiff's interest in 25,000 shares of

LAW OFFICES
RAPHAEL K. YUNES — 420 LINCOLN ROAD — MIAMI BEACH, FLORIDA 33139

Exhibit R

Q Well, do you remember telling me on your deposition that you had been in the business forty years about?

A Well, my family owned the bank forty years, sir.

Q And you were the executive vice president, is that right?

A Right, sir.

Q Also vice chairman of the Board?

A Chairman of the Board, right.

Q And you have dealt in the stock market, haven't you?

A Yes, sir.

Q You bought and sold stock?

A Yes, sir.

Q And you know what the purchase of stock is under an investment letter, do you not?

A Yes, sir.

Q You know what restricted stock is?

A Yes, sir.

Q You know what unrestricted stock is?

A Yes, sir.

Q Now, did Mr. Olsen ever represent you in any lawsuit?

(Goodman) A No, sir.

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Q Did he ever represent you in any transaction?

A No, sir.

Q Did you ever pay him a legal fee?

A No, sir.

Q Ever contract with him to represent you as a lawyer?

A No, sir.

Q Ever make a contract with him to represent you as a lawyer?

A No, sir.

Q Now, when you went to Mr. Sibley, you employed him as a lawyer, didn't you, to represent you?

A I made no contract.

Q Well, did you employ him to represent you?

A Yes, sir.

Q And did you explain the transaction to him that you had with Mr. Olsen?

A Yes, sir.

Q You told him how much was due?

A Right.

Q And he represented you?

A Right.

R-37

Exhibit S

ORAL ARGUMENT
FRIDAY, SEPTEMBER 13, 1974
FIVE MAN COURT

STYLE: Saul Goodman v. Richard H. Olsen
Case No. 45,356

STATUS: Petition for writ of certiorari having been granted to the District Court of Appeal, Third District. 291 So. 2d 71.

FACTS: On September 17, 1968, Goodman and Olsen entered into an investment contract related to a business venture. Olsen, an attorney, prepared and wrote in his own hand a contract under the terms of which Goodman agreed to put up $300,000 of which Olsen would borrow $150,000, the total to be used to purchase 50,000 shares of Omega Equities, Incorporated. Each party was to own 25,000 shares, with Olsen's 25,000 shares pledged as collateral on the $150,000 loan from Goodman.

In the contract, Olsen agreed to repay the $150,000 loan by May 13, 1969, and further agreed to purchase Goodman's 25,000 shares at $10 per share should he desire to sell. This purchase was to take place between October 31, 1969, and December 31, 1969. In the event Olsen failed to pay the purchase price of the stock within ten days from the tender of it, Goodman could sell the shares and Olsen would be liable to him for any sums less than $10 per share.

Olsen also agreed not to sell any of his shares prior to December 31, 1969, without Goodman's prior written consent unless all of his obligation to Goodman in the venture were satisfied. Further, Olsen agreed to take out a $400,000 life insurance policy payable to Goodman, with Olsen paying the premiums, such policy to remain in good standing until the conclusion of the agreement.

The final written understanding between the parties was that the shares were to be held jointly and that the shares were to be 50,000 of a 100,000 share certificate. The other 50,000 shares were to be held by the parties as Trustees until registration, at which time they were to be registered in the respective owners' names. Also, at the time of the registration, the 50,000 owned by the parties were to be registered, 25,000 shares in Goodman's name, and in the event Olsen had any obligation still due and owing to Goodman, 25,000 shares in their joint names, otherwise 25,000 in Olsen's name.

On September 18, 1968, Goodman delivered to Olsen a check in the amount of the contract, i.e., $300,000. Thereafter, Olsen repaid $60,000 of the $150,000 loaned to him by Goodman. Olsen failed to repay the balance due on the $150,000 loan when due in May 1969, and failed to buy back the Omega shares pursuant to the contract.

Goodman commenced the instant litigation in two counts; the first count for repayment of $90,000, the balance still due of the $150,000 loan; and the second count for damages for failure to comply with terms of the contract of September 17, 1969, in refusing to buy back the Omega Equities Corporation stock from the petitioner. Olsen interposed in his answer the affirmative defense of usury. After a jury trial, petitioner moved for directed verdict, which motion was denied. Certain instructions were given to the jury as to the law of the case over the objections of petitioner, inasmuch as the instructions given failed to adequately apprise the jury that an attorney, who prepares a note for a lender from whom he has borrowed money, is estopped to assert the affirmative defense of usury when sued on the note, whether or not said attorney is also an attorney employed by the lender, or is simply an attorney-borrower from the layman. The jury's verdict on said instructions was for the respondent, whereupon the petitioner filed motion for judgment in accordance with motion for directed verdict; or in the alternative, for a new trial, both of which motions were denied by the trial court.

of cases cited in support thereof, no opinion.

ISSUE: Whether or not the decision of the Third District Court is in conflict with In State of Florida, Ex Rel. The Florida Bar v. Delves, 160 So.2d 114 (Fla.1963) and The Florida Bar v. Pitts, 219 So.2d 427 (Fla.1969), on the question of estoppel to claim usury as a defense and the trial court's instructions to the jury on usury.

DISCUSSION: In the Delves case, involving a disciplinary proceeding, this Court held that the conduct of an attorney in furnishing a defective instrument to laymen from whom the attorney obtained a substantial loan and in thereafter filing his affidavit in a suit by laymen to enforce the note, charging that the note was usurious and at least partially unenforceable, warranted suspension. Delves had raised the affirmative defense of usury when suit was filed to enforce payment of the note. In deciding to increase the punishment of reprimand ordered by the Board of Governors of the Florida Bar to a twelve month suspension, the court quoted from the judgment:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note, was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the Bar can only bring discredit upon the entire profession."
> 160 So.2d 114, 115.

In the Pitts case, the same principle was restated that where suspension from the practice of law is based on borrowing a substantial sum of money from a client at a usurious rate and then pleading usury as a defense to a suit on the note, restitution or at least arrangements for restitution satisfactory to the client should be the condition to reinstatement. The Delves case was cited with approval in Pitts, supra.

Petitioner contends that the principle laid down in Delves and supported by the Pitts case estops the attorney-defendant being sued on a note from claiming usury as a defense as a matter of law; and further, that in the event such litigation reached a jury, it should be on appropriate instructions that the principle in the Delves case was in fact the controlling law.

Respondent contends that both Delves, supra, and Pitts, supra, are wholly and completely involved in a construction and interpretation of the Integration Rule of the Florida Bar and have not the remotest relation to or similarity with any of the issues presented in the case sub judice.

RECOMMENDATION: Withheld pending oral argument.

Are privy mis. record proper?

LM:bw

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,163
45,356

DCA NO. 72-978

SAUL GOODMAN,

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

REQUEST FOR ORAL ARGUMENT

COMES NOW RICHARD H. OLSEN, Respondent, by and through his undersigned attorneys, and respectfully requests the Court to grant respondent an opportunity to argue this cause orally before this Honorable Court.

TAYLOR, BRION, BUKER & GREENE
320 Barnett Bank Building
Post Office Box 1796
Tallahassee, Florida 32302
ATTORNEYS FOR RESPONDENT

By _____
WILBUR E. BREWTON

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Leo Greenfield, Esquire, 1680 N.E. 135th Street, North Miami, Florida 33161, by U.S. Mail this 29th day of June, 1976.

_____
Attorney

APPENDIX J

IN THE SUPREME COURT OF FLORIDA

SAUL GOODMAN,)
Petitioner,)
v.) CASE NOS. 43,168 and 45,356
RICHARD H. OLSEN,)
Respondent.)
)

PETITION IN FAVOR OF REVIEW

COME NOW Donald L. Tucker, as Speaker of the Florida House of Representatives, and William J. Rish, as Chairman of the Florida House of Representatives' Select Committee on Impeachment Inquiry Into the Conduct of Supreme Court Justice David L. McCain, by and through counsel, and file this Petition in Favor of Review of the Petition for Constitutional Writ in Aid of Jurisdiction which was filed in the above-cited causes, and as good cause therefor state:

1. Petitioners have reviewed formerly confidential files of the Supreme Court and the Impeachment Record and concur in the allegations as set out in the Petition filed in this cause that several misrepresentations of fact and law and misstatements of fact and law have been practiced upon the Court.

2. Petitioners having reviewed the Petition for Constitutional Writ further state that practices and methods of former Justice McCain as alleged in the Petition, are those which the Select Committee discovered in its impeachment investigation of former Justice McCain.

3. The allegations of the Petition, if true, would appear to warrant this Court assuming jurisdiction pursuant to Article V, Section 3 (b)(4), Florida Constitution, at least

until it lays to rest any suspicion or feeling of wrongdoing, misrepresentation or misstatements in reference to the instant cause.

4. Petitioners note throughout the discussion in the inner Court memoranda prepared by former Justice McCain he made several misstatements of fact and law which could lead to a different result in this cause.

5. Petitioners further assert that it is in the public interest when questions of this type are raised before the Court, that the Court review the matter to determine that the facts found by the jury and comprising the record below have not been ignored or distorted by a Justice in reaching a decision so that fraud or other imposition has been perpetrated upon this Court, or any other party, and so that no ruling of this Court is rendered upon a misrepresentation or misstatement of the facts.

WHEREFORE, Petitioners pray that this Court take jurisdiction in the above cited causes and enter its Order granting Petitioners leave to intervene for the purpose of filing an amicus brief in support of facts and jurisdiction and such other pleadings as provided by the rules and laws of Florida.

Respectfully submitted,

Talbot S. D'Alemberte
Counsel, Select Committee on Impeachment

by:
Marc H. Glick
Counsel/Staff Director
Select Committee on Impeachment

FLORIDA HOUSE OF REPRESENTATIVES

APPENDIX K

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,168
45,356

DCA No. 72-978

SAUL GOODMAN,

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

PETITION FOR REHEARING

Respondent, RICHARD H. OLSEN, respectfully petitions this Honorable Court to set aside and reconsider its Order of July 30, 1976. The copy of said Order received by Respondent (copy attached) did not indicate whether it was an order per curiam, or if it is the order of less than the full Court, the number, and identify the members of the Court voting for the Order to Deny. Article V, Section 3(1) of the Constitution of the State of Florida requires the affirmative vote of at least four justices to support an order or decision. Said Order denied, without opinion, Respondent's Petition for Constitutional Writ in Aid of Jurisdiction.

The Court, in its Order of July 30, 1976, denying without opinion Respondent's Petition for Constitutional Writ in Aid of Jurisdiction, has overlooked and failed to consider that Respondent is entitled, under Article I of the Constitution of the State of Florida, and Articles V and XIV of the Constitution of the United States, to due process of law, and

Respondent respectfully submits that, as here pertinent, due process of law should mean nothing less than a decision of this Honorable Court based solely upon the facts of record developed in the Court below rather than upon the briefing memroanda prepared by former Justice David L. McCain.

It is in the manifest interest of justice and of grave public concern that in this country governed by law, not men, this Court review this matter to determine if the facts found by the jury were ignored or distorted by former Justice McCain in the briefing memoranda he supplied to this Honorable Court.

Respondent respectfully submits that his Petition for Constitutional Writ in Aid of Jurisdiction has underscored, with unmistakable particularity, a minimum of twelve instances where the briefing memoranda distorted the actual facts of record and applicable law so as to mislead this Honorable Court to reach a decision not warranted by the actual record below, and the verdict of the jury.

Respondent respectfully submits this is a denial of the due process of law as guaranteed him under Article I of the Constitution of the State of Florida and Articles V and XIV of the Constitution of the United States.

WHEREFORE, Respondent respectfully petitions this Honorable Court to reconsider Respondent's Petition for Constitutional Writ in Aid of Jurisdiction, and, as requested therein:

1. To issue a Constitutional Stay Writ in Aid of Jurisdiction; to stay the pending Circuit Court action until determination by this Court of this Petition;

2. To review the matters set forth in the Petition for Constitutional Writ in Aid of Jurisdiction as they relate to the records of the trial court and Court of Appeal, Third District, and issue a written opinion concerning the allegations contained therein;

3. To require the filing or submission of brief and oral argument in the instant cause, should the Court deem

the same necessary to clarify the facts, issues and distortions; and

4. To grant such other relief as the Court may deem just and proper.

Respectfully submitted,

TAYLOR, BRION, BUKER & GREENE
320 Barnett Bank Building
Post Office Box 1796
Tallahassee, Florida 32302
ATTORNEYS FOR RESPONDENT

By _____
WILBUR E. BREWTON

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Leo Greenfield, Esquire, 1680 Northeast 135th Street, North Miami, Florida 33161, by U.S. Mail this 16th day of August, 1976.

_____
Attorney

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 30, 1976

SAUL GOODMAN,

Petitioner,

vs.

RICHARD H. OLSEN,

Respondent.

** CASE NOS. 43,168
** 45,356
**

The Petition in Favor of Review filed by Donald L. Tucker, as Speaker of the Florida House of Representatives, and William J. Rish, as Chairman of the Florida House of Representatives' Select Committee on Impeachment, etc., is denied, and it is further

ORDERED that the Petition for Constitutional Writ in Aid of Jurisdiction filed by Respondent Olsen is hereby denied.

A True Copy-

TEST:

Sid J. White
Clerk Supreme Court.

Y
CC: Hon. Wilbur E. Brewton
Hon. Leo Greenfield
Prunty, Ross, De Loach & Olsen
Hon. John W. Prunty
Hon. Talbot S. D'Alemberte,
Hon. Marc H. Glick
Peloquin, McKeon & Reilly
Hon. Frank Ragano

MIAMI REVIEW — MIAMI, FLORIDA

Supreme Court, U. S.
FILED
MAR 9 1977
MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

October Term, 1976

NO. 76-902

RICHARD H. OLSEN,

Petitioner,

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

LAW OFFICES OF
LEO GREENFIELD, P.A.
Attorney for Respondent
1680 N.E. 135th Street
North Mami, Florida 33181

MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

CITATIONS

CITATIONS (cont.)

RULES

in the

Supreme Court

of the

United States

October Term, 1976

NO. _____

RICHARD H. OLSEN,

Petitioner,

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent prays that the Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Florida entered on the 30th day of November, 1976, and an order Denying Petition for Rehearing on October 15, 1976, be denied, and that said Petition for Writ of Certiorari be dismissed, forthwith.

INTRODUCTION

Respondent, being dissatisfied with the presentation by the Petitioner due to inaccuracies or omissions, has deemed it necessary to restate, pursuant to the provisions of Rule 40, portions of Petitioner's Petition for Writ of Certiorari, identified as:

OPINIONS BELOW;
JURISDICTION;
THE QUESTIONS PRESENTED; and
THE STATEMENT OF THE CASE.

Additionally, the Petition contains certain irrelevant, immaterial and scandalous matter, *de hors* the record, impugning the integrity of the Supreme Court of Florida.

For the foregoing reason, as well as others herein demonstrated, the Petition should be disregarded and stricken by the Court.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida dated November 7, 1974, is printed as Appendix "A" hereto, although it is included in Petitioner's Appendix, but inasmuch as the contents thereof are frequently referred to in this Brief, it is printed for the Court's easy literary reference.

JURISDICTION

Petitioner invokes jurisdiction of this Court under Title 28, USC, §2101(c). Said Section contains no matters which pertain to the jurisdiction of this Court or the grounds upon which it may be invoked; and consequently, no fair claim for the invoking of jurisdiction is presented to this Honorable Court. Respondent is not fairly advised under what provision of the United States Code jurisdiction is claimed for this Petition, and must contest jurisdiction on all grounds. Certainly, the provisions of Title 28, USC, §2101(c), confer no jurisdiction on this Court to review the Judgment in question by Writ of Certiorari, and in fact, the provisions of Title 28, USC, §1257, require that Writ of Certiorari be from Final Judgments of the highest Court of the involved State.

Jurisdiction of this Court herein is denied on a variety of grounds set forth in detail in the Argument portion of this Brief, entitled "REASONS FOR NOT GRANTING THE WRIT".

A capsulization thereof, at this juncture, would be useful to the Court.

A. The Judgment of the Supreme Court of Florida, entered on November 7, 1974, sought to be herein reviewed, was not a Final Judgment, and remanded the cause to the Circuit Court of Dade County, Florida, for trial.

B. No substantial Federal question is raised by the Petition because the decision of the Florida Supreme Court, complained of herein, was based on non federal grounds.

QUESTIONS PRESENTED

The questions presented by Olsen herein, raised no substantial federal question. The questions as presented by the Petitioner are discussed at length, infra, in detail, but the response thereto can be capsulized for the easy reference of the Court, as follows:

1. In both Questions 1 and 2 presented by Olsen, the questions assume and state as fact matters which are not even presented by the Record but which are, in fact, de hors the Record. Both questions assume that former Florida Supreme Court Justice David L. McCain, made deliberate misstatements of fact and law to the members of the Florida Supreme Court while a Justice in Cases No. 43,168 and 45,356, which involved both the Petitioner and the Respondent.

The contention is that the Petitioner was thus denied due process of law.

Further, the question presented assumed that Olsen had demonstrated properly twelve substantive errors of fact and law contained in misleading, confidential written memoranda, circulated by McCain to the other Justices of the Court, and that therefore, the Order of the Supreme Court of Florida denying Olsen's second Petition for Constitutional Writ in Aid of Jurisdiction denied due process to Olsen.

The questions as fairly presented are simply, whether or not, on the Record before it, the Supreme Court of Florida denied Olsen due process in its Order denying his Petition for Constitutional Writ in Aid of Jurisdiction.

Respondent's position, stated in detail, infra, in the Argument section of this Brief, is simply that Olsen, in his Petition for Constitutional Writ in Aid of Jurisdiction, attempted to invoke the jurisdiction of the Florida Supreme Court, under Article V, Section 3(b)(4), of the Constitution of the State of Florida, the "All Writs" provision of the Florida Constitution.

The Supreme Court construed its own Constitution and denied the Petition. The construction of the Florida Constitution by its Supreme Court, Respondent contends, is uniquely within the province of the Florida Supreme Court and raises no substantial federal ground for invoking Certiorari.

STATEMENT

I. Nature of the Case

This Petition arises from a Petition for Constitutional Writ in Aid of Jurisdiction to the Supreme Court of Florida, which sought review, after Rehearing had been denied by the Supreme Court of Florida, of an Order of the Supreme Court of Florida, of November 7, 1974, granting the Petition to the Florida Supreme Court for Certiorari to Saul Goodman, reversing an affirmance by the District Court of Appeal of Florida, Third District, of a Judgment of that Court in favor of the Petitioner, Olsen, and remanding the cause for new trial.

This Petition seeks to review the Order of the Supreme Court denying Olsen's Petition for Constitutional

Writ in Aid of Jurisdiction. Said Order of denial being dated July 30, 1976, from which Rehearing was denied on October 15, 1976.

The aforesaid Order of the Supreme Court of Florida of July 30, 1976, does not constitute a "Final Judgment", which under Title 28, USC, may be reviewed by the Supreme Court of the United States by Writ of Certiorari.

II. Persons Involved

THE PETITIONER: Richard H. Olsen, is a member of the Florida Bar since 1957, a specialist in corporate acquisitions, both in New York and Florida, and an investor in numerous corporate stock acquisitions with special expertise therein. Since 1960, Olsen and the Respondent, Saul Goodman, a much older man, had a continuing quite close social friendship. Although Olsen never professionally represented Goodman, he did, over the course of years, give Goodman various legal opinions. Their relationship was quite close, and Goodman relied on him.

THE RESPONDENT: Saul Goodman, is sixty-seven (67) years old, a businessman long since retired (1958), unmarried and alone. Formerly, Goodman was an occasional investor who had several transactions with Olsen in the past.

III. The Case

This cause involved an action at law on a joint venture pursuant to a contract, hand-written by Olsen, an attorney, and dated September 17, 1968. Under the terms of the joint venture, Goodman (Plaintiff below and Respondent here), advanced the sum of $300,000.00 for the purchase of 50,000 shares of Omega Equities, Inc. common stock under an investment letter. Of the $300,000.00 advanced by Goodman under the joint venture, $150,000.00 was a loan to Olsen with which he was to purchase 25,000 shares of the 50,000 shares to be purchased. Goodman would purchase the other 25,000 shares with the remaining $150,000.00 of the funds being advanced.

The contract written by Olsen further provided that Olsen would repay the $150,000.00 on or before May 31, 1969, *with no interest.* Olsen further agreed that if Goodman wished to sell his 25,000 shares between October 1, 1969, and December 31, 1969, that Olsen would repurchase the same for $10.00 per share. Thereafter, Goodman delivered a check to Olsen for $300,000.00, which was subsequently delivered to Omega in exchange for the purchase of the stock in question.

After maturity of the note, Olsen repaid $60,000.00 of the $150,000.00 loan, but failed to make further payments. As a result, Goodman filed suit in the Circuit Court of Dade County, Florida, for repayment of the balance due, and for damages incurred by Goodman when Olsen failed to comply with the terms of the contract and declined to buy back the stock from Goodman. The principal defense interposed by Olsen was that the contract was usurious under the Laws of the State of New York, and unenforceable. Olsen made this contention, although he, himself an attorney, had drawn the agreement and had obtained as a result thereof, $15,000.00 from Goodman, his old friend, a non-attorney who had relied upon him. It was conceded by the parties that the transaction occurred in New York, and that New York Law should apply.

After a two day trial, a verdict in favor of Olsen resulted, which was followed by a Judgment thereon.

Goodman appealed to the District Court of Appeal of Florida, Third District, but the Appeal was dismissed for failure to timely file a Brief by his then counsel.

Goodman's appeal was reinstated when the Supreme Court of Florida granted a Writ of Certiorari, and remanded the cause to the District Court of Appeal of Florida, Third District, to be heard on its merits. Said District Court of Appeal of Florida, Third District, subsequently affirmed the Trial Court Judgment in favor of Olsen.

Goodman again sought certiorari from the Supreme Court of Florida pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida on a claim of jurisdictional conflict between Decisions of the Supreme Court and other District Courts of Appeal of Florida, and the Per Curiam Decision of the District Court of Appeal of Florida, Third District in the case at bar.

On June 24, 1974, the Supreme Court accepted jurisdiction on the cause and directed the parties to file Briefs on the merits of the cause.

No portion of the conditional Writ of Certiorari discussed or set forth the Court's reasoning in connection with the conflict in question, and allegations of the Petition and his Petition as to the Court's reasoning in this regard are but the purest speculation by Petitioner.

Because of efforts made throughout this Petition to cast aspersions on the integrity of the Supreme Court of

Florida, totally unsupported by the Record, it is necessary to set forth as to the Decisions of the Supreme Court of Florida herein involved, the names of the Justices, concurring and dissenting.

The Supreme Court of Florida accepted conflict jurisdiction of this cause on June 24, 1974, without dissent. The concurring Justices were Adkins, Chief Justice; Roberts; McCain; Dekle; and Overton. It should be noted that of the five Justices unanimously voting to conditionally accept jurisdiction, only two participated, whose integrity is contested by Olsen.

Subsequently, the Supreme Court, having granted conditional jurisdiction, entertained the merits of the cause and reversed the District Court of Appeal of Florida, Third District.

The cause was remanded to the Circuit Court of Dade County, Florida, for retrial and thus does not constitute a Final Judgment of the Supreme Court of Florida from which, under the Federal Judiciary Code, Petitioner herein may invoke certiorari.

The makeup of the Panel of the Florida Supreme Court which, having accepted certiorari, entertained the merits of the Petition and reversed the cause, and remanded it for new trial, is as follows: Adkins, Chief Justice; Roberts; McCain; Ervin; and Boyd. There was a single dissent by Justice Overton.

Thus, only one of the five Justices who remanded Petitioner's cause for a new trial to the Circuit Court of Dade County, Florida, has resigned, to-wit: Justice McCain. There was only one dissent. The foregoing actual head count of the panels of the Supreme Court granting certiorari in this cause and reversing the matter on its merits reveals the immateriality of the portions of this Petition which infer that the reversal of Olsen's case in the Supreme Court of Florida is due to improper motives or lack of integrity of the Florida Supreme Court.

There is absolutely nothing, even in the materials outside the record, presented in Petitioner's Appendix to his Brief which would indicate any irregularity, even in the assignment of the Goodman-Olsen case to Justice McCain, when Goodman's Second Petition for Writ of Certiorari reached the Supreme Court of Florida, Case No. 45,356.

In lieu of any evidence to the contrary, it must be presumed that Case No. 45,356 was assigned to Justice McCain in normal rotation under the blind filing system. Certainly no evidence appears, even *de hors* the record, and presented by Affidavits contained in the Appendix of the Petitioner, that would indicate otherwise.

Thereafter, a Petition for rehearing was filed by Olsen, which was denied on January 29, 1975.

In the face of such a record, any contention of irregularity in the handling of the cause at bar by the Florida Supreme Court or any further impugning of the motives and integrity of that body are patently absurd.

Nevertheless, a fact which is deliberately omitted from the Petition for Certiorari herein, on January 15, 1975, the Petitioner herein filed with the Supreme Court of Florida its first Petition for Constitutional Writ in Aid of Jurisdiction, Case No. 45,356. The Florida Appellate Rules and the Rules of the Florida Supreme Court provide only one Petition for Rehearing and the aforesaid Petition for Constitutional Writ in Aid of Jurisdiction was actually a second attempt at a Petition for Rehearing.

With the Court fully concurring, the first Petition for Constitutional Writ in Aid of Jurisdiction was denied on March 1, 1976.

Thereafter, the Petitioner attempted before the Florida Supreme Court, what amounted to a third application to that Court, for a Rehearing of the decision of the Supreme Court of Florida, on November 7, 1974, reversing the Third District Court of Appeals of Florida, on Certiorari, and remanding the Goodman-Olsen cause for new trial.

On June 29, 1976, Olsen filed a second Petition for Constitutional Writ in Aid of Jurisdiction with the Supreme Court of the State of Florida, which Petition was, in fact, a disguised third application to the Supreme Court of Florida, for rehearing of its decision of November 7, 1974.

The Petition for Constitutional Writ in Aid of Jurisdiction filed with the Supreme Court of Florida, covered in more detail, much of the same ground contained in Olsen's first Petition to the Supreme Court of the United States in this cause, Case No. 74-1610, and attempted by

the same means of innuendos, speculation, suspicion and immaterial, scandalous allegations, to obtain an additional Rehearing in this cause.

Olsen had appended to his original Petition for Certiorari to the Supreme Court of the United States, all of the confidential memoranda, Court files and Court notes of the Supreme Court of Florida, which embraced the decision of that Court of November 7, 1974.

Said documents were appended as Appendices "G", "H" and "I", to the aforesaid Petition of Olsen filed in the Supreme Court of the United States, which Petition was denied by this Honorable Court on October 6, 1975.

On July 14, 1976, a most unusual document was filed with the Supreme Court of Florida while there was still pending before that Court Olsen's Petition for Constitutional Writ in Aid of Jurisdiction. That document was a pleading not provided for in any fashion by the Florida Appellate Rules or by the Rules of the Florida Supreme Court. It was entitled as a Petition in Favor of Review and was filed by one Donald L. Tucker, purportedly in his capacity as Speaker of the Florida House of Representatives, and by William J. Rish, purportedly as Chairman of the Florida House of Representatives Select Committee on Impeachment Inquiry. (App. "B").

The pleading alleged no facts or authorities, but was simply a mere letter of support, designed to influence the Supreme Court of Florida to grant the Petition filed by Olsen for Constitutional Writ in Aid of Jurisdiction.

The Petition was extraordinary in the sense that although it purported to be brought on behalf of the "Select Committee on Impeachment of Justice McCain," and by Donald Tucker, as Speaker of the Florida House of Representatives. No Resolution of the House of Representatives authorized either Tucker or Mr. Rish, as Chairman of the Select Committee, to attempt to intervene or file pleadings in the private lawsuit between two Florida citizens, and obviously, therefore, the House of Representatives and its Committee, and in particular, Messrs. Tucker and Rish, had no authorization to file the Petition in Favor of Review.

Interestingly enough, the authority of Mr. Rish's "Select Committee" expired when former Justice McCain resigned from the Florida Supreme Court on April 28, 1975.

That the Select Committee's authority ended with the McCain resignation, was conclusively admitted by Committee Staff Director Mark Glick. In his Affidavit supporting the original Olsen Petition for Certiorari filed with the Supreme Court of the United States. Glick stated:

> "16. The resignation of Justice McCain ended the authority of the Select Committee on impeachment and precluded further investigation into the Goodman-Olsen cases."

The bona fides of the "Petition in favor of Review," filed over the signature of Staff Director Mark Glick for the "Select Committee on Impeachment," is immediately suspect where the party filing the Petition has already

sworn, under oath, that his Committee's authority was ended in April 28, 1975, fourteen months prior to the filing of the "Petition in Favor of Review."

On July 30, 1976, the Supreme Court of Florida denied the Olsen Petition for Constitutional Writ in Aid of Jurisdiction and the "Petition in Favor of Review," filed by Messrs. Tucker and Rish, allegedly signed and authorized only by the expired Select Committee on Impeachment by its Staff Director, Mr. Mark Glick. Actually, neither Mr. Tucker nor Rish signed the Petition nor have they in any fashion signed through counsel representing them.

As the face of the document reveals, the Petition in Favor of Review was actually signed as authorized only by the defunct Select Committee on the impeachment of Justice McCain, by Mr. Glick.

A Petition for Rehearing was denied by the Florida Supreme Court on October 15, 1976.

REASONS FOR NOT GRANTING WRIT

Title 28, USC, §1257, provides as pertinent hereto, as follows:

> "Sec. 1257 — STATE COURT; APPEALS; CERTIORARI — Final Judgments or Decrees rendered by the highest court of a State in which a Decision could be had, may be reviewed by the Supreme Court as follows . . ."

The language of the above-quoted pertinent Statute is crystal clear that this Honorable Court will review by

certiorari, as pertinent to the instant cause, only a Final Judgment of the highest court of Florida. The language speaks for itself, but has been highlighted and underlined many times by the Decisions of this Honorable Court.

In the case at bar, the Supreme Court of Florida reversed the District Court of Appeal of Florida, Third District, and remanded the cause for a new trial by jury, on November 7, 1974. Respondent's first Petition for Certiorari which this Court denied on October 6, 1975, sought Certiorari from that November 7, 1974, Judgment of the Supreme Court of Florida.

This Petition for Certiorari is even farther removed from a "Final Judgment."

After the Supreme Court of Florida had denied on January 29, 1975, a rehearing of its Order of November 7, 1974, and Olsen's first Petition for Constitutional Writ in Aid of Jurisdiction on March 1, 1976, Olsen filed a second Petition for Constitutional Writ in Aid of Jurisdiction. The Supreme Court of Florida denied Olsen's second Petition for Constitutional Writ on July 30, 1976, and his Petition for Rehearing therefrom, on October 15, 1976.

By no stretch of legal sophistry, is the Florida Supreme Court Order of July 30, 1976, from which Olsen's Petition is taken, related to the "Final Judgment" required to invoke this Court's jurisdiction.

As a general rule, Judgment of the highest court of a State, reversing an inferior Court and remanding the case to the Lower Court for new trial, is not a Final Judgment, and hence, is not reviewable by the Supreme Court

of the United States. *Urie vs. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018, 11 A.L.R.2d 252; *Gulf Refining Co. vs. U.S.*, 269 U.S. 125, 70 L.Ed. 195, 46 S.Ct. 52; *Scott vs. Booth*, 253 U.S. 475, 64 L.Ed. 1020, 40 S.Ct. 484; *Coe vs. Armour Fertilizer Works*, 237 U.S. 413, 59 L.Ed. 1027, 35 S.Ct. 625.

Case law is clear that, in general, the finality of a State Appellate Court's reversal of a Lower Court depends upon whether under State Law, the effect of the reversal is to grant a new trial.

In *Gospel Army vs. Los Angeles*, 331 U.S. 543, 91 L.Ed.1662, 67 S.Ct. 1428, it was held that an unqualified reversal by a State Court is not a Final Judgment, for purposes of review by the Supreme Court of the United States, where the reversal operates to remand the case for a new trial.

The foregoing basic propositions of law which are applicable hereto, show that without question the language of the opinion of the Supreme Court of Florida in the cause at bar, remanding this cause for a new trial renders the reversal and the decision not a "Final Judgment" for purposes of Court review.

As this Court said in *North Dakota Pharmacy Board vs. Snyder Stores*, 414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407:

> "(2) The finality requirement of 28 U.S.C., Sec. 1257 (28 U.S.C.S., Sec. 1257) which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

As Mr. Justice Frankfurter stated in *Radio Station WOW vs. Johnson*, 326 U.S. 120; 89 L.Ed. 2092, 65 S.Ct. 1475:

> " . . . And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation (414 U.S. 160) only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree'. Sec. 237 of the Judicial Code, 28 U.S.C., Sec. 344(a) (28 U.S.C.S., Sec. 344(a)). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

As pointed out in *Gospel Army, supra*, a Judgment of an Appellate Court, to be final and reviewable under this Title, must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the Trial Court, except the ministerial act of entering Judgment, which the Appellate Court directed. In that case, the Judgment reversed by the California Supreme Court had the effect, under State practice, of remanding the case for new trial. The rationale of the case conclusively applies to the cause at bar. A host of additional decisions are all to the same effect, and have been

cited, supra. A typical cause whose decision is precedent for the denial of certiorari herein is *Southern Pacific vs. Gileo*, 351 U.S. 493, 100 L.Ed. 1375, 76 S.Ct. 952. In that case where the California Supreme Court reversed decisions of Lower California Courts and remanded cases for trial on the issues of negligence and damages, the Supreme Court of the United States held that there was no "Final Judgment" of the highest court of a State, within the meaning of the Title in question; and, therefore, the United States Supreme Court lacked jurisdiction to review.

There can be little question that in view of these authorities and the specific language of 28 U.S.C., §1257, no jurisdiction for review is indicated herein.

As pointed out previously herein, multiple grounds exist for the denial of jurisdiction by this Court to entertain Olsen's Petition for Certiorari. Certainly foremost among them is the fact that neither of the two questions presented by Olsen herein raise a substantial federal question.

Olsen seeks review of an Order of the Supreme Court of Florida, denying his Petition in that Court for a Constitutional Writ in Aid of Jurisdiction.

His Petition in the Florida Supreme Court sought to invoke the jurisdiction of that Court under Article V, Section 3(b)(4), of the Constitution of the State of Florida. In denying Olsen's Petition for Constitutional Writ, the Florida Supreme Court necessarily interpreted its own Constitution.

Jurisdiction was sought by Olsen under the, "All Writs" Section of the Florida Constitution under which the Supreme Court of Florida is granted the power, "to issue all Writs necessary to the complete exercise of its jurisdiction."

This Honorable Court has stated many times, and established as a solid proposition of law, that it will not review a Judgment of a State Court where the contention is that the State Court exceeded its powers under the State Constitution. A review is precluded if the decision of the State Court is upon a point of local or general law sufficient to support the Judgment. This rule is not altered by the fact that the Supreme Court may consider the position of the State Court in the non-federal or local matter as an unsound one. *Schuylkill Trust Co. vs. Pennsylvania*, 302 U.S. 506, 82 L.Ed. 392, 58 S.Ct. 295; *DeSaussure vs. Gaillard*, 127 U.S. 216, 32 L.Ed. 125, 8 S.Ct. 1053.

Petitioner is asking this Honorable Court to review the Judgment of the Florida Supreme Court constructing its own State Constitution; and this, as the foregoing citations and many more indicate, this Court has pre-emptorily stated it will not do.

Parenthetically, it is well to note that the position of the Florida Supreme Court on the non-federal or local matter involved, i.e., the interpretation of the "All Writs" provision of the Florida Constitution, was, as a matter of fact and as a matter of law, a sound position.

Florida case law is clear, since *State ex rel Watson vs. Lee*, 8 So.2d 19, that the constitutional power granted to the Florida Supreme Court to issue, "all writs necessary

or proper to the complete exercise of its jurisdiction," refers only to ancillary writs to aid in complete exercise of original or appellate jurisdiction of the Supreme Court and does not confer added, original or appellate jurisdiction in any case.

As the Florida Supreme Court said in *Watson vs. Lee:*

> "The Constitution of the State and not a common law prerogative or other writ confers jurisdiction upon the Supreme Court of Florida. Judicial writs when duly authorized and issued, are the means by which the all ready conferred jurisdiction of the Court may be applied to particular cases. Unless the Constitution confers jurisdiction on the Supreme Court, the issue of a judicial writ by the Court does not confer jurisdiction upon the Court. Where the Court has jurisdiction the issuance by it of a judicial writ attaches the existing, conferred jurisdiction of the Court to a particular case."

In the instant cause, and in reference to the order from which the instant Petition is taken, no all-ready conferred jurisdiction existed in the Florida Supreme Court by which an ancillary so called Constitutional Writ could be issued.

Of the two matters complained of in this Petition, the latest of them in point of time, is the opinion and decision of this Court of November 7, 1974, granting Goodman's Petition for Certiorari. Petition for Rehearing was thereafter, denied, as set forth supra, as was a subsequently filed Petition by Olsen, to the Supreme Court of the United States, and as was thereafter filed, a former Petition for Constitutional Writ in Aid of Jurisdiction.

No matters were pending before the Florida Supreme Court which would confer jurisdiction between these parties in that Court to which an ancillary writ could issue. The Florida Supreme Court having denied Olsen's Petition for Rehearing of its Order of November 7, 1974, granting Certiorari to Olsen, that Court lost jurisdiction of the cause.

As the Florida Supreme Court stated further in *State ex rel Watson vs. Lee*, supra:

> "When, and not until, jurisdiction is acquired can ancillary writs be duly issued by the Court, and only when necessary or proper to the complete exercise of its jurisdiction."

Florida Appellate Rule 3.14(e), specifically provides as follows:

> "The Petitioner shall be entitled to file only one Petition for Rehearing with respect to the particular decision and no further Petition or Motion will be received or filed by the Clerk or considered by the Court."

Thus, as aforesaid, the Petition for Rehearing having been denied, and the cause having been remanded to the trial Court, the Supreme Court of Florida, had lost jurisdiction and no ancillary writ could be issued by that Court.

In addition to the clear lack of jurisdiction on the part of the Florida Supreme Court to issue a Constitutional Writ in Aid on Jurisdiction, as requested by Olsen, the Petition itself was based on facts which were obviously and patently non meritorious.

Olsen's Petition for Constitutional Writ in Aid of Jurisdiction as stated herein supra, was largely a rehash of previous Rehearing Petitions, filed before the Supreme Court of Florida, Olsen's prior application to the Florida Supreme Court on his first Petition for Constitutional Writ in Aid of Jurisdiction and a prior application for Certiorari to the Supreme Court of the United States, all of which had been previously denied.

In a major portion of his Petition, Olsen set forth what he termed was a complete picture of the misrepresentations, omissions and fraud practiced in this case. The same should be more realistically phrased as a compilation of irrelevant trivia, speculation, innuendoes and suspicion, founded on not an iota of fact, and without any support whatsoever from the Record. Olsen led off by attempting to make capital out of the fact that Goodman's original Petition for Certiorari to the Florida Supreme Court in this cause initially was assigned to Justice Ervin and then reassigned to Justice McCain as lead Justice. Mr. Sid J. White, Clerk, of the Third District Court of Appeal of Florida, testified before the House Select Committee on Impeachment that he had no recollection as to whether or no any request had been made by McCain for assignment in the instant cause.

Consequently, in lieu of any evidence to the contrary, it must be assumed that Justice McCain did not make such

a request. It certainly cannot be the result of speculation and innuendo and suspicion that in some manner he did, when there is absolutely no evidence to that effect.

Apparently, the Court changed its mind as Courts frequently do, as to whether or not the Court had jurisdiction in the cause to entertain Certiorari. There is no explanation for the change and in lieu of any evidence to the contrary, it must be presumed that it was a routine change of opinion, such as, from time to time, does occur in appellate decisions.

In a contention labled Item 3 on Page 8 of this Petition, Olsen attempted to resurrect as, "misleading" a statement in a Court memorandum on "Determination of Jurisdiction on Reassignment, February 5, 1973," written by former Justice McCain. Olsen, in this particular item in his Petition, took issue with a statement by former Justice McCain that, "Petitioner filed its Brief at the Court's suggestion on that date."

The Petition then went on to argue at large, that the Third District Court of Appeals of Fla. had never suggested that Goodman file his Brief and to take issue with the decision of law granting conflict which involved *Hector Supply vs. Carter*, 122 So.2d 22.

All of these contentions and claims as stated hereinabove, supra, were "old hat" and had been before the Florida Supreme Court on prior occasions and ruled inadequate. Nevertheless, by these extraordinary Petitions, which had no basis jurisdictionally or otherwise, Olsen attempted to require that Court to rehear over and over again, arguments which they had, long ago, rejected.

As pointed out, supra, the contentions about Goodman's Brief having been filed at the Court's suggestion, and the complaints about the erroneous law being applied, in re *Hector Supply Company vs. Carter*, supra, were all raised in a prior extensive Motion for Rehearing filed by Olsen on May 9, 1973, and denied on June 26, 1973, by the Florida Supreme Court.

In his Petition, Olsen then went on further to contend that former Justice McCain misled the Court by a note on the memorandum containing recommendations which stated:

> "Without attempting to go to the merits the record proper indicates a fairly strong case for Petitioner, i.e., (1) no showing of prejudice to Respondent to the Petitioner's tardiness in filing brief, (2) internal mixup between lawyers and (3) brief was finally filed by Petitioner."

Again, Olsen was simply attempting to reargue questions of law, long since decided by the Court. There was certainly no question that no showing of prejudice to Olsen was ever made due to the delay of Goodman in filing the Brief nor was there any question that Goodman did file a Brief at the time of oral argument.

One contention made by Olsen in his Petition for Constitutional Writ in Aid of Jurisdiction, was a total misrepresentation to the Florida Supreme Court. At Page 10 of his Petition, objecting to the above quoted McCain note, Olsen said:

> "There was only one attorney of record for Goodman so that there was no 'mixup' between lawyers; . . . ."

Of course, both the Record and the Appendix filed by Goodman with his Brief in Case No. 43,168, contained the motion of Goodman for Leave of Court to File Appellant's Brief and the supporting Affidavit of Ivonne N. Conner, a secretary to Goodman's counsel, as well as the Affidavit of Frank Ragano, himself, Goodman's counsel, as to the circumstances which occasioned the tardiness of Goodman's Brief.

The Affidavits explained that Frank Ragano was a law partner with Raymond LaPorte, and that LaPorte maintained the Tampa office of the firm, and that Ragano handled the Miami office.

Ragano's Affidavit revealed that Raymond LaPorte had, at all times, maintained the primary responsibilities for the handling of this case, and that all papers pertaining to the appeal were filed from the Tampa office and all Transcripts sent to the Tampa office. The Affidavit went on to aver that Ragano believed that Raymond LaPorte, his Tampa partner, was preparing and handling the appeal. When Ragano became aware that the Brief had not been filed by LaPorte, as he was supposed to do, he immediately attempted to correct the error.

Obviously, then, the major contention of Goodman in seeking permission to file his Brief as supported by

Affidavits and which were part of the Record, was the "mixup" between LaPorte and Ragano, one in Tampa and one in Miami, as to the filing of Goodman's Brief.

The statement in Olsen's Petition for Constitutional Writ in Aid of Jurisdiction, Page 10 thereof, relating to the Florida Supreme Court that there was only one attorney of record for Goodman, so that there was "no mixup between lawyers," was clearly an attempt to mislead this Court into believing former Justice McCain's footnote to be totally false. The opposite is clearly true and is a fair measure of the bona fides of Olsen's Petition. If ever there was a misrepresentation, certainly this one made to the Florida Supreme Court is obvious and gross.

In the next section of his Petition, Olsen complained about what he termed extraordinary circumstances and misrepresentations as to Case No. 45,356. Again, he complained about the case being assigned to former Justice McCain, even under the standard procedure of blind assignment on a rotation basis by the Clerk's office.

In lieu of any evidence to the contrary, the Record indicates that Case No. 45,356 was assigned to Justice McCain in normal rotation, innuendo of Olsen to the contrary.

The principal item criticized as to Case No. 45,356 by Olsen in his Petition, was the memorandum written by Justice McCain, on "Determination of Jurisdiction Certiorari." Most specifically, Olsen deplored what he contended was a misrepresentation by omission to apprise the Court that the case was to be governed and tried under the laws of the State of New York, as agreed to by the parties therein.

Any reading of the opinion filed November 7, 1974, in Case No. 45,356, reversing the Third District Court of Appeal of Florida, and remanding the matter for a new trial, would show how ridiculous Olsen's contention is. Obviously the panel was totally advised and completely aware that the case was governed by and tried under the laws of the State of New York as agreed upon by the parties.

The entire opinion deals with the discussion of New York law, of the New York Usury Statute and of the interpretation of New York cases involving the same.

The Court simply found that under New York law, the contract between the parties was a joint venture, and that, thus, the defense of usury was not applicable.

The Court said:

> "Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instruction to the jury thereon in this action tried in Florida, was error." (App. "A"-A-6).

Justices Adkins, Roberts, Ervin and Boyd concurred with McCain in the opinion, with only Justice Overton dissenting.

Olsen, in his Petition, even objected to the statement in the memorandum by former Justice McCain:

> "Goodman and Olsen entered into an investment contract related to a business venture."

The contract between the parties handwritten by Olsen himself, an attorney, commences with the sentence, "As per our joint venture, it is agreed that you shall put up the sum of $300,000.00, of which sum I am borrowing $150,000.00. . . ."

Again, going on in his Petition for Constitutional Writ in Aid of Jurisdiction, Olsen objected to the statement by McCain:

> "Olsen prepared and wrote in his own hand a contract under the terms of which Goodman agreed . . . ."

The truth of it is and the Record reveals that Olsen did prepare and write in his own hand, the contract involved. The statement at Page 13 of the Petition that the agreement was dictated to Olsen by Goodman is patently false, and a misrepresentation to the Florida Supreme Court. Even a cursory examination of the Transcript of Testimony references made in support of this statement in the Petition, revealed that Goodman did not dictate the agreement to Olsen. There is no question that Goodman requested and required some evidence to support the agreement between the parties and his loan of $150,000.00 to Olsen, *without interest*. The Record reveals that the parties sat together in New York and Olsen prepared the document, paragraph by paragraph, and at the conclusion of each paragraph asking Goodman if that represented a correct statement to which, as they proreeded, Goodman would assent.

The next item complained of in the Petition related to the $10,000.00 which Olsen paid to Goodman via a

Western Union Money Order, sometime after the agreement between the parties was signed. That this sum and that this contention of Olsen was not before the Florida Supreme Court at all times pertinent hereto, is ridiculous to assert. Actually, the item in question was raised in the basic pleadings in this cause in the trial Court, and was the basic subject matter of the First Petition for Constitutional Writ previously filed by Olsen in this cause, on December 15, 1975, which Petition was denied by the Florida Supreme Court on March 1, 1976, Justices Overton, Roberts, Adkins, Sundberg and Hatchett concurring.

Petition for Rehearing was denied by the Florida Supreme Court on April 2, 1976. The remainder of the contentions of Olsen as set forth in his Petition for Constitutional Writ in Aid of Jurisdiction are simply rearguments and rehashing of the laws of New York and of Olsen's allegedly violated constitutional rights under the Constitution of the United States.

All of these matters have been raised before in Olsen's First Petition for Certiorari filed in the Supreme Court of the United States and in various Petitions for Rehearing and applications for Constitutional Writs previously filed in this cause.

CONCLUSION

No grounds for invoking the jurisdiction of this Honorable Court to issue a Writ of Certiorari have been properly invoked herein.

In summarizing, the Petition herein incorrectly seeks Certiorari from an Order and decision of the Supreme Court of Florida of July 30, 1976, and an Order denying a Petition for Rehearing, entered on October 15, 1976, neither of which was a Final Judgment but which remanded the cause to the trial Court for jury trial.

The Order of the Supreme Court of Florida of July 30, 1976, from which review is sought herein, is thus, not a "Final Judgment" from which Certiorari will issue from this Court.

No substantial federal question is raised by the Petition, as is evidenced by the Petition itself.

The Order from which Olsen seeks review herein, is an Order of the Supreme Court of Florida, denying Olsen's Petition for Constitutional Writ in Aid of Jurisdiction filed before that Court. In entering its Order of denial from which review is sought herein, the Supreme Court of Florida construed the language of its own Constitution.

The construction of a State's own Constitution by its Supreme Court is uniquely within the province of that Court and thus, no substantial federal ground is presented for invoking Certiorari.

The matters contained in Olsen's own Petition to the Florida Supreme Court for Constitutional Writ in aid of execution, were, in and of themselves, partially based on misrepresentations made by Olsen to the Florida Supreme Court in re the Record as is set forth herein, supra.

The entire Petition is but a rehash cloaked in new garments of previous arguments made to this Court and to the Supreme Court of Florida which have already been denied, and which matters have already been subject to Petitions for Rehearing, which in turn have been, themselves, denied.

For the foregoing reasons we respectfully urge that this Court deny Certiorari and dismiss the Petition herein, forthwith.

Respectfully submitted,

LAW OFFICES OF
LEO GREENFIELD, P.A.
1680 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Respondent

By_____
Leo Greenfield

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was this _____ day of March, 1977, mailed to:

ROBERT D. PELOQUIN, ESQ.,
1707 - H Street, N.W.
Suite 400 Washington, D.C. 20006

and

JOHN W. PRUNTY, ESQ.,
837 City National Bank
Miami, Florida 32130
Attorneys for Petitioner

By_____
Leo Greenfield

APPENDIX

APPENDIX "A"

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

CASE NO. 45,356
DCA CASE NO. 72-798

SAUL GOODMAN,

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

Opinion files November 7, 1974

Writ of Certiorari to the District Court of Appeal, Third District

Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner

John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So.2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry v. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div. 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency, is not ipso facto usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S. 2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is no certainty that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S. 2d 106, 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup. Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint ven-

ture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), rev'g 12 Misc. Rep. 434 (Dist. Ct. N.Y. City 1895). In the Orvis case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lost anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in Orvis held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the Orvis minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: Cusick v. Ifshin, supra.

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000 was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumpton there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur

OVERTON J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circut Court and the Third District Court of Appeal.

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 43,168 and 45,356

SAUL GOODMAN

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

PETITION IN FAVOR OF REVIEW

COME NOW Donald L. Tucker, as Speaker of the Florida House of Representatives, and William J. Rish, as Chairman of the Florida House of Representatives' Select Committee on Impeachment Inquiry Into the Conduct of Supreme Court Justice Davis L. McCain, by and through counsel, and file this Petition in Favor of Review of the Petition for Constitutional Writ in Aid of Jurisdiction which was filed in the above-cited causes, and as good cause therefor state:

1. Petitioners have reviewed formerly confidential files of the Supreme Court and the Impeachment Record and concur in the allegations as set out in the Petition filed in this cause that several misrepresentations of fact and law and misstatements of fact and law have been practiced upon the Court.

2. Petitioners having reviewed the Petition for Constitutional Writ further state that practices and methods of former Justice McCain, as alleged in the Petition, are those which the Select Committee discovered in its impeachment investigation of former Justice McCain.

3. The allegations of the Petition, if true, would appear to warrant this Court assuming jurisdiction pursuant to Article V, Section 3 (b)(4), Florida Constitution, at least until it lays to rest any suspicion or feeling of wrongdoing, misrepresentation or misstatements in reference to the instant cause.

4. Petitioners note throughout the discussion in the inner Court memoranda prepared by former Justice McCain he made several misstatements of fact and law which could lead to a different result in this cause.

5. Petitioners further assert that it is in the public interest when questions of this type are raised before the Court, that the Court review the matter to determine that the facts found by the jury and comprising the record below have not been ignored or distorted by a Justice in reaching a decision so that fraud or other imposition has been perpetrated upon this Court, or any other party, and so that no ruling of this Court is rendered upon a misrepresentation or misstatement of the facts.

WHEREFORE, Petitioners pray that this Court take jurisdiction in the above cited causes and enter its Order granting Petitioners leave to intervene for the purpose of filing an amicus brief in support of facts and jurisdiction and such other pleadings as provided by the rules and laws of Florida.

Respectfully submitted,

/s/ Talbot S. D'Alemberte

Talbot S. D'Alemberte
Counsel, Select Committee on Impeachment

by: /s/ Marc H. Glick

Marc H. Glick
Counsel/Staff Director
Select Committee on Impeachment
FLORIDA HOUSE OF REPRESENTATIVES

MIAMI REVIEW — MIAMI, FLORIDA

Supreme Court, U. S.
FILED
MAR 14 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-902

RICHARD H. OLSEN,

Petitioner

vs.

SAUL GOODMAN,

Respondent

REPLY TO BRIEF IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

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OCTOBER TERM, 1976

No. 76-902

RICHARD H. OLSEN,

Petitioner

vs.

SAUL GOODMAN,

Respondent

REPLY TO BRIEF IN OPPOSITION

In accordance with the provisions of Rule 24.4 and 24.5, this Reply will be limited to arguments first raised in Respondent's Brief in Opposition and to "other intervening matter" not available at the time of the filing of Petitioner's Petition for Writ of Certiorari.

I

The intervening matter is the deposition of Florida Supreme Court Justice James C. Adkins taken September 15, 1976 in the matter of *The Florida Bar*, Complainant, vs. *David Lucius McCain*, Respondent, a proceeding to determine whether former Justice McCain should be prohibited from practicing law in Florida. Pertinent pages of this deposition are printed as Appendix A. The existence of this deposition did not become known until it was placed in evidence on February 16, 1977 in the Florida Bar proceedings against former Justice David L. McCain, as reported in the Florida press on February 17, 1977. Efforts were then made to obtain a copy of the deposition.

In the deposition, Justice Adkins, who was Chief Justice of the Florida Supreme Court at the time of the impeachment proceedings before the Select Committee on Impeachment of the Judiciary Committee of the Florida House of Representatives, testified that just prior to Justice McCain's resignation he had a weekend-long series of conferences with Justice McCain. As a result of these conferences, he testified that he approached the members of the Select Committee and gained from them agreement that the Committee would halt its impeachment inquiry into Justice McCain's activities provided he submitted his resignation from the Florida Supreme Court. He stated that he did this "because, if that is what he was going to do, I would rather not have any articles of impeachment ever entered against a member of the Court . . . " (Appendix A, Page 3) In other words, the then Chief Justice intervened to prevent the inquiry of the Select Committee from running its full and, by then, obvious course.

II

The Brief in Opposition, which was filed by Respondent, not as a matter of initial conviction within the time set forth in Rule 24.1, but only after a specific request from the Court on February 8, 1977, hews no closer to the facts of record than the briefing memoranda of former Justice McCain. It does, however, raise for the first time several points to which reply should be made. The first of these appears in the Counter-Statement of the Case. Respondent avers that the "Petition in favor of Review" filed by the Speaker of the Florida House of Representatives and by the Chairman of its Judiciary Committee were authorized only by counsel for the Select Committee, which Committee Respondent alleges expired upon former Justice McCain's resignation. The fact of the matter is that at a meeting of the Select Committee held April 28, 1975 a motion was passed continuing the operation of the Select Committee for the purpose of making information developed on former Justice McCain available to the Florida Bar, members of the Bar, and to Florida authorities (Transcript of the Select Committee, Vol. 6, Book V, pp 146-151). Contrary to Respondent's assertion, filing of the "Petition in Favor of Review" was specifically authorized by the Speaker of the House of Representatives, who is constitutional officer of the State of Florida, and by the Chairman of the House Judiciary Committee, which is a continuing body of the House of Representatives.

III

Respondent's brief next challenges the jurisdiction of this Court to entertain the pending Petition for Writ of Certiorari on the ground that the denial by the Supreme Court of Florida of Petitioner's Petition to that Court for

a Constitutional Writ in Aid of Jurisdiction did not constitute a final judgment within the meaning of 28 U.S.C. 1257.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 497 (1975), this Court discussed at length the question of what constitutes a final judgment under 28 U.S.C. 1257. It concluded that there are now at least four categories of cases wherein it has treated resolution of a Federal issue by a State Supreme Court as a "final judgment" for the purposes of 28 U.S.C. 1257 and has taken jurisdiction without awaiting completion of additional proceedings in lower State courts. Though each category has merit and applicability to the case *sub judice*, the first category is directly on point.

In describing the category of cases, this Court said:

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained*. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills v. Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took jurisdiction on the reasoning that the appellant had no defense other than his federal claim and

> could not prevail at the trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in the judicial systems already troubled by delays due to congested dockets.' Id., at 217-218." (emphasis supplied.)

Additional cases supporting this position are: *Organization for A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Pope v. Atlantic C.L.R. & Co.*, 345 U.S. 379 (1953).

In the instant case, Petitioner has been denied due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, by reason of the actions of former Justice McCain and by the refusal of the Supreme Court of Florida to review these actions. The refusal of the Supreme Court of Florida so to do will force Petitioner into a retrial where the outcome, by reason of former Justice McCain's actions, is preordained, unless this Court takes jurisdiction and remands the proceedings with appropriate instructions, as requested in the Petition for a Writ of Certiorari.

IV

Respondent next asserts that the action of the Supreme Court of Florida denying Petitioner's Petition for a Constitutional Writ was sound as a matter of fact and of law, citing *State ex rel Watson vs. Lee*, 8 So.2nd 19 (1942), as authority for the proposition that the Supreme Court of

Florida lost jurisdiction over the instant proceedings with the issuance of its decision and order of November 7, 1974. However, the prevailing view of the Supreme Court of Florida as to its power to reverse itself is set forth in the case of *Lovett v. State*, 11 So. 176 (1892). In this case the Supreme Court of Florida reversed a decision of a lower court based upon a "false" representation of the record, and issued a remittitur which was filed in the latter court. After discovery of the misrepresentation, the Court reversed itself, correcting the error and said, at 180:

> "The consideration or reversal or affirmance of a judgment or decree, *upon a misrepresentation of the record of the cause, or upon anything else than the true record of that cause,* is entirely outside the functions or purpose of an appellate court." (emphasis supplied)

In pursuing this matter further, the Court continued, saying:

> "This case is, in our judgment, clearly within the rule which preserves our jurisdiction of it. *We have been misled into reversing a judgment on a false record;* into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. *In law, the writ of error issued in the cause is, in so far as our exercise of our powers is concerned, still before us, and will be until that cause, as it really is, shall be decided,* or the writ dismissed on legal grounds. Ostensibly it has passed from use, but only through the means of a misrepresentation, and by

> decision of a case which is not shown by the real record and does not exist. In the eyes of the law, however, decisions or judgments obtained in this manner are not binding on us." (emphasis supplied)

In reaching the above decision, the Court relied on the case of *Rowland v. Kreyenhagen*, 24 Cal. 52, wherein, after stating the general rule that a court loses jurisdiction after issuance of a remittitur, said:

> "... it is said that this general rule rests upon the supposition that all the proceedings have been regular, and *that no fraud or imposition has been practiced upon the court or the opposite party,* and that, if it appears that such has been the case, the court will assert its jurisdiction, and recall the case; that against judgments improvidently granted upon a false suggestion, or under a mistake, as to the facts of the case, the court will afford relief after the adjournment of the terms, and, if necessary, recall the remittitur, and stay proceedings in the court below; *that this is not done upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order; that, in contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity;* if, under color of such an order, the proceedings have in part (fact) found their way back to the court below, yet in the law they are considered as still pending in the appellate court, and

> that court may take such steps as may be necessary to make the facts and law agree." (emphasis supplied)

In the instant matter the Supreme Court of Florida had the unquestioned power and authority to examine what Petitioner considers misrepresentations of fact and law, as well as any abuses of its own internal procedures and processes.

On page 27 of the Brief in Opposition, Respondent makes much of the fact that Justices Adkins, Roberts, Ervin and Boyd concurred with Justice McCain in the November 7, 1974 opinion, with only Justice Overton dissenting on the grounds that the Court improperly asserted jurisdiction. This completely misses the point, but at the same time serves to underscore it. Justice McCain was the lead justice and under the practice of the Court prepared briefing memoranda on the proceeding for the benefit of the other members of the panel. All but Justice Overton, a new member of the Court, were misled by the briefing memoranda. Thus, in reality there were not five independent votes in favor of the opinion, but a single vote echoed four times.

CONCLUSION

On the basis of the pending Petition for a Writ of Certiorari and the foregoing Reply to Respondent's Brief in Opposition, Petitioner respectfully urges the Court to grant his Petition.

Respectfully submitted,

/s/ Robert D. Peloquin, Esquire
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John W. Prunty, Esquire
Counsel for Petitioner
837 City National Bank
Miami, Florida 33130

APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE FLORIDA BAR

Complainant

vs.

DAVID LUCIUS McCAIN

Respondent

Deposition of JAMES C. ADKINS, taken in the above-styled cause, pursuant to notice, at the Supreme Court Building, Tallahassee, Florida, before W. Paul Rayborn, CSR, RPR on the 15th day of September ,1976, commencing at 2:04 p.m.

Reported by:

W. PAUL RAYBORN, CSR, RPR

APPEARANCES

WILSON J. FOSTER, JR., Assistant Bar Counsel, P.O. Box 1347, Tallahassee, Florida 32302, appeared on behalf of the Complainant.

BERNARD H. DEMPSEY JR., Assistant Bar Counsel, Suite 704, Pan American Building, 250 North Orange Avenue, Orlando, Florida 32801, appeared on behalf of the Complainant.

ROBERT J. BECKHAM, Attorney at Law, of the law firm of Beckham, McAliley & Proenza, Suite 3131, Independent Square, One Independent Drive, Jacksonville, Florida 32202, appeared on behalf of the Respondent.

INDEX

JAMES C. ADKINS

called as a witness, having been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. DEMPSEY:

Q Judge, would you state your full name, please?
A. James C. Adkins.

Q This is a matter pertaining to David L. McCain, as you know.
A (Nodded affirmatively)

Q And I want to ask you certain questions with regard to your knowledge of David McCain and certain of the allegations that involve him where your name has been mentioned.
(CONTINUING ON PAGE 46)

Q Now, you were, of course, Chief Justice during the period of time that David McCain decided to resign from the Florida Supreme Court. During that period of time, did you have any conversation with McCain with regard to his resigning?
A Yes. I spent most of Friday, Saturday and Sunday before his resignation with him or at his house.

Q And at that time did you offer him any type of advice?
A Well, I went by on Friday afternoon to get some cases and about the Court's business generally. He was there at his house and we started talking about his present problems. And I think he started by asking me what I would do under the circumstances if I were him.

And we started then a general conversation that lasted for a number of hours. And he finally reached the conclusion that it would be for the best interest of the Court and he felt maybe he would be better off if he decided to resign.
(CONTINUING ON PAGE 46)

And I told him, if that was his judgement, that I would try to get word to the Joint Select Committee, because, if that's what he was going to do, I would rather not have any articles of impeachment ever entered against a member of the Court and see if I could straighten that out.

So I spent most of the rest of the time trying to run down the members of the Committee and work out something with them where we could stop their proceeding on the condition that David would resign. And I also called Jim Ervin, who was the president of the Florida Bar and David asked me to check on what repercussions, if any, would follow from the Bar before he decided what he wanted to do.

And I think Jim had a conference call, he said, with some members of the Executive Committee and that he would call me Friday. And he told me that they had decided they wouldn't commit themselves one way or the other and he added that the Executive Committee felt that, he thought, that the Chief Justice ought to keep out of it and I had acted improperly. And I hung up before I told him I thought he was acting improperly, that I was working for the betterment of the Court, which was an odd thing to do at that time.

But the next morning the resignation was delivered by McCain's brother and Billy Joe Rish called me that (CONTINUING ON PAGE 48)
morning and said he was taking it to the Governor. And the Governor called me and we worked out the acceptance of his resignation.

Q Did anyone in a responsible position on behalf of the Florida Bar ever indicate to you that David McCain—that grievance proceedings would not be instituted against McCain in exchange or in return for his resignation?

A No, I can't say that. They doubted jurisdiction, but they would not commit themselves one way or the other on it. My function in that was purely as Chief Justice to

try to work out something in the benefit of the Court and in the benefit of David. So I can't say that there was any commitment. No, they said that they wouldn't commit themselves on it.

Q Who else was it that indicated that he doubted jurisdiction?

A That was Jim Ervin. I don't say that he doubted it. I said there was a question about it.

Q Now, with regard to the conversation that you had with McCain, did you and he discuss the merits or the allegations that were revolving about him and concerning him?

A No. He denied them. It wasn't a question of going into whether he was right or wrong. It was purely, (CONTINUING ON PAGE 49) after all he had gone through, the emotional problems. His family was upset. He was concerned about the backlash on the Court. We had been through so much. And so it was just a general, overall conversation about, under the circumstances, what was the best for everybody.

Q What is the precise understanding you had with the legislative committee concerning the effect of the tender of the resignation?

A The understanding of the legislative committee was that they would stop their investigation, their proceeding at that moment upon acceptance of the resignation, that the committee would present the resignation to the Governor with a request that he accept the resignation. And they took it to the Governor that morning about eight-thirty and the Governor called me and he had some reservations about the delay in the acceptance.

And I might add that I had discussed that with McCain and the purpose of—we never discussed pension or anything else. The whole thought was that there were hundreds of cases pending up here where he was on the panel. And, as I explained to the Governor, some of these cases had been argued and, as an administrative procedure, if he just (CONTINUING ON PAGE 66) stepped out suddenly, I would have to have all of the cases reargued on five-man panels, which he sat on, which would mean the parties would be delayed and the lawyers would have to come back, too.

He understood the administrative problem. And August was the recess month, anyway, and all we did there was clean up stuff pending. And he agreed to accept the resignation. I have forgotten what date it was, September 1st or whatever it was. And then he asked that McCain not cast a deciding vote or something of that nature. And I didn't think it was any of his business. I agreed to that.

And I think there was only one case that I administratively messed up and had a five-man panel that McCain was on and his vote could be construed as one of the deciding votes. And we granted a rehearing in that one. But it was primarily because of administrative problems that we reached the date of the resignation.

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF LEON)

I, W. PAUL RAYBORN, CSR, RPR, at Tallahassee, Florida, do hereby certify as follows:

THAT I correctly reported in shorthand the foregoing deposition of JAMES C. ADKINS, at the time and place stated in the caption hereof;

THAT the witness was duly sworn and examined by counsel;

THAT I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages 1 through 70, both inclusive, contain a full, true, and correct transcript of the proceedings on said occasion;

THAT I am neither of kin nor of counsel to any party involved in this matter, nor in any manner interested in the result thereof.

THIS ___ day of _____, 1976.

W. PAUL RAYBORN, CSR, RPR
Notary Public
State of Florida at Large
My Commission expires 1/11/78.